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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-938

COX BROADCASTING CORPORATION
and
THOMAS WASSELL,
Appellants,

vs.

MARTIN COHN,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF GEORGIA

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE
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JUDISDICTIONAL STATEMENT

OPINIONS BELOW

The decision and opinion on rehearing of the Supreme Court of Georgia is reported at 231 Ga. 60, — S.E.2d — (1973) and is set forth in Appendix A, *infra* pp. A9-A26. The Opinion of the Superior Court of Fulton County in this cause is not reported but is set forth in Appendix A, *infra* pp. A1-A6.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2), this being an appeal which draws into question the validity of Ga. Code Ann. § 26-9901 *infra*, p. 5, on grounds that it is repugnant to the Constitution of the United States.

Appellants appeal from a judgment of the Supreme Court of Georgia in a civil action for invasion of privacy. The court below ruled that appellants may be held liable for damages for the truthful publication of the name of a deceased victim of a murder-rape in the course of a truthful news story concerning the public trial of those accused of the crime. The news story was broadcast on the day of the trial.

The Georgia Supreme Court expressly held that the Georgia criminal statute (Ga. Code Ann. § 26-9901) prohibiting disclosure of the name of a victim of a rape or attempted rape does not violate the First Amendment to the Constitution of the United States.[1] The Court further held that because of this statute the disclosure of the identity of the victim of such a crime is not a matter of public interest and general concern in the State of Georgia.[2] The Court remanded the case to the trial court with instructions to submit the case

1 "We hold that this 1968 Georgia statute is not unconstitutional, ..." 231 Ga. at 69, Appendix p. A26.

2 ". . . and because of this statute the disclosure of the identity of the victim of such a crime is not a matter of public interest and general concern in this state." 231 Ga. at 69, Appendix p. A26.

to the jury to determine if "reasonable men would find the invasion highly offensive."[3]

Thus there has been a final ruling that appellants' activities were not protected by the First Amendment, and a final ruling that Georgia Code Ann. § 26-9901 does not abridge First Amendment freedom of expression. This judgment gives rise to a situation which fully meets the criteria for finality set forth by this Court in *Local No. 438 v. Curry*, 371 U.S. 542 (1963); *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963); *Brady v. Maryland*, 373 U.S. 83 (1963); *Rosenblatt v. American Cynamid Co.*, 86 S. Ct. 1, 15 L.Ed.2d 39 (1965). In each of these cases this Court has found the requirement of finality satisfied by decisions of the highest state court despite the fact that further proceedings in lower state courts were required.

Although remanding this case to the Georgia trial court for further proceedings, the judgment of the Supreme Court of Georgia is binding upon the trial court and not subject to further review in Georgia. The decision of the Georgia Court seriously erodes the protection afforded newscasters by the First Amendment.[4] The federal claim presented for review here is separate from the issues still to be determined in a state court trial, i.e., whether appellants' actions invaded appellee's right of privacy, and if so, to what

3 231 Ga. at 64, Appendix p. A17.

4 *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Time Inc. v. Hill*, 385 U.S. 374 (1967); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

extent. Determination of appellants' First Amendment claim may avoid a long and costly trial and subsequent appeals. Finally, appellants' claim does present a question which is fundamental to the case and yet is independent of what will be in issue at the trial.

Accordingly, this matter is appropriately brought to this Court by appeal under the authority of the above cited decisions.

The decision of the Supreme Court of Georgia was rendered on September 5, 1973. On September 19, 1973 a petition for rehearing was denied. Timely notice of appeal to this Court was filed in the Supreme Court of Georgia and the Superior Court of Fulton County, Georgia on December 6, 1973.

In the alternative, should this Honorable Court not consider this appeal as the appropriate mode of review, appellants respectfully request that the papers whereupon this appeal is taken be regarded and acted upon as a Petition for a Writ of Certiorari pursuant to 28 U.S.C. § 2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provisions which appellants contend have been violated by the judgment of the Supreme Court of Georgia are the following clauses of the First Amendment to the Constitution of the United States, to wit:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

and the following clause of the Fourteenth Amendment to the Constitution, to wit:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; . . ."

This case also involves 1968 Ga. Laws 1335-1336 (Ga. Code Ann. § 26-9901) which provides:

> "It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor."

QUESTIONS PRESENTED

1.

Whether Ga. Code Ann. § 26-9901, as construed by the Georgia Supreme Court to prohibit the publication of the name of the deceased victim in connection with the truthful news account of the trial of those accused of the victim's murder and rape is unconstitutionally overbroad or otherwise in violation of the freedom of speech and press clauses of the First Amendment as

applied to the states through the Fourteenth Amendment to the Constitution of the United States?

2.

Whether Ga. Code Ann. § 26-9901, as construed by the Georgia Supreme Court to conclusively determine that disclosure of the identity of the victim of a rape or an attempted rape is not a matter of public interest and general concern in the State of Georgia, and to prohibit all such disclosures violates the freedom of speech and press clauses of the First Amendment as applied to the states through the Fourteenth Amendment?

3.

Whether, consistent with the requirements of the First and Fourteenth Amendments to the United States Constitution, the legislature has the power to prohibit the publication of an item of public record as not being a matter of public interest and general concern in the State?

4.

Whether the judgment that a news media and its reporters may be held liable for damages for the truthful publication of the name of a deceased victim of a murder-rape in the course of a timely news story concerning the trial of those accused of the crime violates the freedom of speech and press clauses of the First Amendment as applied to the states through the Fourteenth Amendment?

5.

Whether liability may be imposed for the truthful publication of information which standing alone may not be of public interest where such information is published as a part of a report otherwise concerning a matter of public interest and therefore privileged?

STATEMENT OF THE CASE

Appellant Cox Broadcasting Corporation, the licensee and operator of WSB-TV in Atlanta, Georgia, and appellant Thomas Wassell, at the time a staff news reporter for WSB-TV, have been sued by the appellee, Martin Cohn, for invasion of privacy arising from the appellants' televised news coverage relating to the trial of six young defendants indicted for the murder and rape of the appellee's daughter, Cynthia Leslie Cohn.

Cynthia Leslie Cohn died on August 18, 1971 under circumstances that resulted in the indictment on March 3, 1972 of six young men for her murder and rape.

On April 10, 1972, appellant Wassell, acting in his capacity as a news reporter for WSB-TV, attended the trial of the six youths held in open court at the Fulton County Courthouse. Following the proceedings in open court, appellant Wassell prepared a news report which was subsequently filmed on the steps of the Fulton County Courthouse. This news report was based on information obtained at the trial and from the indictments on record with the clerk of the Superior Court of Fulton County.

The filmed news report related solely to the court proceedings, wherein five of the six defendants entered guilty pleas to charges arising from the death of Cynthia Leslie Cohn, while one defendant first pleaded guilty but during the proceedings, withdrew his plea and demanded a jury trial. In the course of this filmed news report appellant Wassell identified the crimes of murder and rape with which these defendants were charged by reference to the name of the deceased victim, Cynthia Cohn. The sole reference to the victim's name was contained in the opening of the filmed report:

> "Six youths went on trial today for the murder-rape of a teenaged girl.
>
> "The six Sandy Springs high school boys were charged with murder and rape in the death of seventeen year old Cynthia Cohn following a drinking party last August 18.
>
> "The tragic death of the high school girl shocked the entire Sandy Springs community. Today the six boys had their day in court.
>
> "There was no jury. The six boys, through their lawyers, threw themselves on the mercy of the court . . . and the presiding judge, Sam Phillips McKenzie."

The filmed news report went on to relate the names of the six boys and the fact that the murder charges were dropped against all of the defendants. The news report indicated that one defendant withdrew his guilty plea and reported pleas of guilty by five of the defendants to charges of rape and the sentences each received.

This filmed news report was thereafter televised over WSB-TV during the course of its regularly scheduled news programs at 6:00 p.m. on April 10, 1972 and again during the early morning hours of April 11, 1972.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

On May 8, 1972, appellee Martin Cohn filed his Complaint against appellants alleging that appellants had televised or caused to be televised willfully, unlawfully and negligently the name of the appellee's deceased daughter, Cynthia Leslie Cohn as the victim of a rape and attempted rape, contrary to Ga. Code § 26-9901 and further alleging that the broadcast invaded appellee's right of privacy.

Appellants answered this Complaint on June 7, 1972 and asserted, inter alia, that their actions were privileged under the First and Fourteenth Amendments to the Constitution of the United States. Appellants amended their Answer on October 24, 1972 to add the additional affirmative defense that Ga. Code Ann. § 26-9901 was an unconstitutional prior restraint on freedom of speech and press in violation of the First and Fourteenth Amendments to the Constitution of the United States.

There being no dispute as to any material fact, the

appellants and the appellee filed with the trial court cross motions for summary judgment with accompanying affidavits.

On December 13, 1972, the Superior Court of Fulton County entered an order and written opinion (Appendix pp. A1-A6) granting the appellee's motion for summary judgment as to the issue of liability and denying the appellants' motion for summary judgment. The court held that Georgia Code Ann. § 26-9901 stated a rule of civil conduct which the appellants had violated by their actions and for which they were liable for damages. The court ruled:

> "In the opinion of the court said law is not unconstitutional as a rule of civil conduct for any reason set forth in the pleadings of this case.
>
> Said law is restrictive of speech and press, but not unreasonably so, and here the privileges and liberties in this regard must yield to the public good and individual liberties."

On December 22, 1972, the appellants filed a Motion to Reconsider in the Superior Court of Fulton County with respect to that court's order of December 13, 1972. In this Motion the appellants again raised the federal issues for the court's consideration.

On December 29, 1972, the Superior Court reaffirmed and adhered to its order and opinion of December 13, 1972 and certified that the order should be subject to review by direct appeal.[5]

---

5 This Certificate was issued pursuant to Georgia Code Ann. § 81A-156(h) which provides:

On January 9, 1973 the appellants appealed the orders of December 13 and 29, granting the appellee's motion for summary judgment on the issue of liability and denying the appellants' motion for summary judgment to the Supreme Court of Georgia. In this appeal the appellants asserted that their actions were privileged under the First and Fourteenth Amendments to the United States Constitution [Appellants' Assignment of Error No. 4, 10] Appellants further asserted that Georgia Code Ann. § 26-9901, to the extent that it applies to the actions of appellants, violates the First and Fourteenth Amendments to the United States Constitution. [Appellants' Assignment of Errors No. 12, 13]

The Supreme Court of Georgia, in a divided opinion, (4-3), affirmed the judgment of the trial court in part, reversed in part and remanded with direction. The Court held that Georgia Code Ann. § 26-9901 does not give rise to a civil cause of action and unanimously reversed the entry of summary judgment for the appellee on the issue of liability. 231 Ga. at 62, Appendix, *infra* pp. A12-A13.

"An order granting summary judgment on any issue, or as to any party, shall be subject to review by appeal; but an order denying summary judgment is not subject to review by direct appeal or otherwise, unless within ten days of the order of denial the trial judge certifies that the order denying summary judgment as to any issue or as to any party should be subject to review, in which case such order shall be subject to review by direct appeal."

A certificate of review was also granted following the Superior Court's initial decision on December 13, 1972.

But a majority (4-3) of the Court affirmed the denial of the appellants' motion for summary judgment. The Court expressly considered the "head-on collision between the tort of public disclosure and First Amendment rights of freedom of speech and press." The majority (4-3) of the Court concluded:

> "First Amendment proscriptions do not bar the claim of the appellee against the appellants in this case." 231 Ga. at 66. Appendix p. A21.

Three dissenting Justices of the Georgia Supreme Court concluded that the actions of the appellants were privileged as a publication of information regarding a matter of public interest. 231 Ga. at 67. Appendix p. A22.

The appellants moved for rehearing in the Supreme Court of Georgia and once again asserted their claims of privilege under the First and Fourteenth Amendments to the Constitution of the United States.

> "However, the majority has overlooked the unbroken line of controlling authority in which the United States Supreme Court, since 1964, has held that the news media is *constitutionally privileged* to publish *truthful accounts of matters of general or public concern*, for which no criminal sanction or civil damages may be imposed. See e.g., *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 29 L. Ed. 2nd 296 (1971); *Time, Inc. v. Hill*, 385 U.S. 374, 17 L. Ed. 2d 456 (1967); *New York Times Company v. Sullivan*, 376 U.S. 264, 11 L. Ed. 2d 686 (1964); *Garrison v. Louisiana*, 379 U.S. 64, 13 L. Ed. 2d 125 (1964)."

On September 19, 1973, the Supreme Court of Georgia denied the appellant's Motion for Rehearing and expressly ruled that the 1968 Georgia Criminal Statute (Ga. Code Ann. § 26-9901) was constitutional. The Court held that this statute conclusively determined that the disclosure of the identity of the victim of a rape or an attempted rape is not a matter of public interest and general concern in the State of Georgia and such a disclosure was not within the protection of the First Amendment:

> "A majority of this Court does not consider this statute to be in conflict with the First Amendment. We think the General Assembly of Georgia had a perfect right to declare that the victim of such a crime should not be publicly identified by the news media. The First Amendment is not absolute; and we consider this statute to be a legitimate limitation on the right of freedom of expression contained in the First Amendment.
>
> "There simply is no public interest or general concern about the identity of the victim of such a crime as will make the right to disclose the identity of the victim rise to the level of First Amendment protection.
>
> . . .
>
> "We hold that this 1968 Georgia statute is not unconstitutional, and because of this statute the disclosure of the identity of the victim of such a crime is not a matter of public interest and general concern in this State." 231 Ga. at 68-69, Appendix pp. A24-A26.

Thus, the Supreme Court of Georgia passed on the

Federal questions raised by appellants, including the constitutionality of Ga. Code Ann. § 26-9901, and determined that said statute did not violate the First Amendment of the Constitution of the United States and that the appellants actions were not privileged under the First Amendment of the Constitution of the United States.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

1.

The judgment of the Georgia Supreme Court presents the substantial question whether, consistent with the requirements of the First and Fourteenth Amendments to the United States Constitution, the legislature has the power to prohibit publication of an item of public record as not being a matter of public interest and general concern in the State.

The judgment of the Supreme Court of Georgia holds that the legislature has the power to withdraw the First Amendment protection afforded to the publication of truthful facts concerning matters of court record and public interest by enacting a legislative determination that a particular type of public information, here the name of a deceased victim of a rape, is never a matter of public interest and general concern.

In its opinion on rehearing the court held:

"We think the General Assembly of Georgia had a perfect right to declare that the victim of such a

crime should not be publicly identified by the news media.

. . .

. . . and because of this statute the disclosure of the identity of the victim of such a crime **is not a matter of public interest and general concern in this State."** 231 Ga. at 68-69, Appendix pp. A24-A26.

This grave intrusion into the area of expression protected by the First Amendment, is unsupported by discussion or even citation of a single opinion of this Court in the majority opinion for the Georgia Supreme Court.

It is apparent that this recognition of the legislature's power to determine what is in the "public interest and general concern" and to thereby preclude publication and discussion of public facts has far broader implications than the limitations imposed under the facts of this case.

This Court has not had occasion to examine the question although, in a number of cases, this Court has ruled that publication of information was within the protection of the First Amendment because it was a matter of public concern. See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374 (1967). The Court held:

"We have no doubt that the subject of a *Life* article, the opening of a new play linked to an actual incident, is a matter of public interest." 385 U.S. at 388.

In *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971) this Court held that the publication of reports of court

actions by news media would not support a libel action in the absence of a showing of actual malice as defined in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In *Rosenbloom* the petitioner conceded that the police campaign to enforce the obscenity laws was an issue of public interest and therefore within the constitutional guaranties of freedom of speech and press. 403 U.S. at 40.

The sweeping language contained in Ga. Code Ann. § 26-9901 prohibits publication of the names of the victims in all instances including those in which, the appellants submit, the publication of the names of the victims would be matters of legitimate public interest. Thus the sweep of the Georgia statute is unnecessarily broad and invades areas of public freedoms. See *Cantwell v. Connecticut*, 310 U.S. 296, 84 L. Ed. 1213 (1940); *Shelton v. Tucker*, 364 U.S. 479, 5 L. Ed. 2d 231 (1960); *Elfbrandt v. Russell*, 384 U.S. 11, 16 L. Ed. 2d 231 (1966).

The appellants submit that the effect of the statute is to unnecessarily restrict the free and open discussion of matters of public record, actions of public officials and issues of public concern.

Accordingly, appellants respectfully submit that the judgment of the Supreme Court of Georgia raises a very substantial federal question, the resolution of which is of vital importance to the institution of a free press.

2.

The judgment of the Georgia Supreme Court is contrary to the holdings of the United States Supreme Court that no civil or criminal penalty may be imposed upon the truthful publication of matters of public interest.

Under the decisions of this Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); and *Rosenbloom v. Metromedia, Inc.* 403 U.S. 29 (1971) published reports by news media, relating to public officials, public figures and matters of general or public concern, have been held to be privileged in the absence of malice consisting of reckless disregard of the truth or knowledge of the actual falsity of the report.

Appellants believe that the decision of the Georgia Supreme Court squarely contravenes the holding of this Court in *Time, Inc. v. Hill, supra.* This Court there denied recovery for an invasion of privacy where the report was false in fact. In the present case there is no question that the report published by these appellants was truthful. In *Time, Inc. v. Hill, supra*, this Court held that the publication concerning the opening of a play on Broadway was a matter of public interest and therefore privileged. The report in the present case concerns the public trial of those accused of murder and rape, a matter clearly of public interest.

The appellants further contend that the decision of the Georgia Supreme Court conflicts directly with the holding of this Court in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). Although this Court in *Rosenbloom*, was unable to agree on a majority opinion it appears that the decision of the Georgia Supreme Court is contrary to the narrowest privilege afforded

by any of the plurality opinions in *Rosenbloom*. Mr. Justice White concluded that, in the absence of actual malice as defined in *New York Times, supra*, the First Amendment gives the news media privilege to report and comment upon the official actions of public servants in full detail, without sparing from public view the reputation or privacy of an individual involved in or affected by any official action. 403 U.S. at 62.

The report published by appellants here concerned a public trial wherein the charges and pleas were changed and reduced, and sentences were imposed by the court on those accused of a particularly notorious crime. Thus the report was in essence a report and comment upon the actions of public officials and privileged under the narrowest reading of *Rosenbloom*.

The judgment of the Georgia Supreme Court is also directly contrary to the holdings of this Court that the First and Fourteenth Amendments to the Constitution of the United States prohibit the infliction of either civil damages or criminal penalties upon one who publishes a truthful account about a matter of public concern. *Garrison v. Louisiana*, 379 U.S. 64, (1964); *Kois v. Wisconsin*, 408 U.S. 229 (1972).

Mr. Justice Undercofler speaking for the three dissenting justices of the Georgia Supreme Court in the case at bar recognized the impact that the decisions of this Court have had in the areas of reports concerning matters of public interest:

> "The constitutional freedoms of press and speech are so jealously guarded that even publication of *false* reports of matters of public interest are privileged absent a showing that the defendant 'published the report with knowledge of its falsity or in reckless disregard of the truth.' *Time, Inc. v. Hill*, 385 U.S. 374, 388 (87 SC 534, 17 L. Ed. 2d 456). Certainly the publication of true information regarding matter of public interest can be no less privileged. The constitutional privilege is controlling regardless of whether recovery would be predicated on violation of statute, or on some theory akin to negligence per se with the statute providing the duty or standard of care owed the plaintiff, or, as the majority would have it, on the basis of 'that reasonable men would find the invasion highly offensive.' 231 Ga. at 67-68, Appendix pp. A22-A23.

Thus the majority decision and judgment of the Supreme Court of Georgia seriously erodes the protection afforded appellants by the First and Fourteenth Amendments to the United States Constitution.

3.

Assuming that the publication of the victims name is not of itself privileged as a matter of public interest, the judgment of the Georgia Supreme Court raises the question of whether liability may be imposed for the truthful publication of such information in the course of a report otherwise concerning a matter of public interest and therefore privileged.

Assuming, arguendo, that publication of the name of the victim is not, of itself, privileged under the First and Fourteenth Amendments, the question still re-

mains whether the appellants may be subjected to liability for the publication of such information in the course of a report otherwise dealing with a matter admittedly of official record and public concern.

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), this Court concluded that a rule which compelled the critic of official conduct to guarantee the truth of all his factual assertions and to do so on pain of a libel judgment would lead to "self-censorship." 376 U.S. at 279. Consequently, this Court held that the First Amendment required a rule which protected even erroneous statements unless such statements were made with actual malice. 376 U.S. at 279-290.

In similar fashion, the judgment of the Georgia Supreme Court which permits a newsman to be held liable for damages for the broadcast of a particular fact which is subsequently held not to be a matter of public interest, will lead inevitably to self-imposed restrictions on what matters are broadcast to the public. Such self-censorship is inconsistent with the First Amendment. Permitting a newscaster to broadcast some matters which arguably may not be in the public interest is absolutely essential to insuring that all matters of public interest are broadcast. In disseminating information to the public a broadcaster must be given some latitude. Otherwise, First Amendment freedom of expression will not have the "breathing space" that it needs to survive. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Appellants would submit that the constitutional protection afforded the publication of matters of public interest includes the publication of a fact which of

itself is arguably not a matter of public interest and concern where it is published as a part of a report concerning a matter of public interest.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kirk M. McAlpin, counsel for Appellants, hereby certify that I have served a copy of the foregoing Jurisdictional Statement by depositing a copy of the same in the United States Mail, properly stamped and addressed, to:

Mr. Stephen A. Land
Zachry & Land
1505 Fulton National Bank Building
Atlanta, Georgia 30303

This day of December, 1973.

KIRK M. MCALPIN

APPENDIX

IN THE

SUPERIOR COURT OF FULTON COUNTY

File No. B-74692

MARTIN COHN,
Plaintiff,

vs.

COX BROADCASTING CORPORATION and
THOMAS WASSELL
Defendants.

ORDER ON MOTIONS FOR SUMMARY JUDGMENT FILED BY SAID PLAINTIFF AND SAID DEFENDANTS

[By Judge Durwood Pye, Fulton Superior Court]

— A —

Paragraph Three of plaintiff's Complaint alleges in part: On April 10, 1972 and on April 11, 1972 the defendants . . . . caused to be televised and did televise in two newscasts the name of Cindy Cohn, also known as Cynthia Leslie Cohn the victim of a rape and attempted rape, and the daughter of the plaintiff herein, contrary to Ga. Code Ann. § 26-9901 (Acts 1968, pp. 1249, 1335) thereby disseminating to the public the identity of a female who was raped and upon whom an assault with intent to commit rape was made.

In answer to said paragraph three defendants say in part (paragraph three of second defense): Answering the allegations of paragraph three of plaintiff's Complaint, defendants' admit that they caused to be televised a newscast at approximately 6 p.m. on April 10, 1972 and at approximately 12:15 a.m. on April 11, 1972, wherein the name of the said Cynthia (Cindy) Leslie Cohn was mentioned once and defendants' further admit that the said Cynthia (Cindy) Leslie Cohn was the daughter of plaintiff and was the purported victim of a rape and attempted rape . . . .

In an affidavit of plaintiff he deposes in part: I am the father of Cynthia Leslie Cohn, 17 who died on August 18, 1971.

The Court is unable to find any denial of this sworn statement among the papers submitted.

This is the only portion of the affidavits submitted by or on behalf of plaintiff which the court considers upon said motions for summary judgment; and therefore makes no ruling in respect of questions presented by pleadings attacking affidavits submitted on behalf of plaintiff.

The court has considered all pleadings and briefs of all parties, and all evidentiary material submitted by defendants.

—B—

A portion of said Act of 1968 is set forth in Sec. 26-9901 of Ga. Code, Ann., in part as follows:

It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made.

Section 1 of the Act approved August 21, 1911 (Ga. Laws 1911, page 179-180), provides:

Sec. 1. Be It Enacted by the General Assembly of the State of Georgia, and it is hereby enacted by the authority of the same, that from and after the passage of this Act it shall be unlawful for any newspaper publisher, or any other person to print and publish, or cause to be printed and published in any newspaper, magazine, periodical or any other publication published in the State of Georgia the name or identity of any female who may have been raped, or upon whom an assault with intent to commit rape may have been made.

Assuming the statute above referred to from the Code Ann. and the Act of 1968 to be purely a penal statute, it is clear that said Sec. 1 of the 1911 Act states a rule of civil conduct, which was not repealed by the New Penal Code set forth in the 1968 Act (Ga. Laws 1968 beg. at p. 1249) Cf. 142 Ga. 802.

As the publications complained of come within

Sec. 1 of the Act of 1911, as the same states a rule of civil conduct, and as the plaintiff is not shut into the Act of 1968 alone, it is unnecessary for the court to make any *definite determination* as to whether the Act of 1968 *in fact and law* is merely penal and does not state a rule of civil conduct, and for the purposes hereof will refer to *both* Sec. 1 of the 1911 Act and said portion of the 1968 Act as "said law."

Defendant attacks the 1968 statute as unconstitutional, and the court will rule thereon, and likewise finds it just to treat said attacks as also directed to Sec. 1 of the 1911 Act as the same states a rule of civil conduct; rulings as to constitutional matters relate to both Acts.

In the opinion of the court said law is not unconstitutional as a rule of civil conduct for any reason set forth in the pleadings in this case.

In the opinion of the court said law is to be construed with the laws of privilege as to Court proceedings, and in pari materia, and said laws as to privilege are thereby modified to the limited extent stated.

Said law is restrictive of speech and press, but not unreasonably so, and here the privileges and liberties in this report, must yield to the public good and individual liberties.

Said law is in part declaratory of the natural and fundamental rights of privacy existing under the common law of this State and the Constitution thereof, and in part in implementation thereof, and in part a statutory extension of such rights; it operates not

only in favor of the name, identity, reputation and repute of the woman wronged, but in favor of her family, and especially as to an infant in favor of her father to whom her name and fame are committed in trust to his paternal care, and whose reputation, name and fame are a part of his own, when said law is violated as to such daughter, it is violated as to him; an action by the father upon said law is in no true sense an action of relational right, but any action for injury done the father, as positive and direct as the lightning bolt, and as the protection of said law is not abated by the death of the woman, and the father's injury no less that his daughter shall have died, the death of the infant is neither justification or excuse.

Being of opinion as aforesaid, it is considered ordered and adjudged by the court as follows, to-wit:

(a) That the motion of defendants for summary judgment be and the same is hereby overruled and denied;

(b) That the motion of plaintiff for summary judgment be and the same is hereby granted and ordered only as to liability;

(c) That plaintiff is entitled to recover of both defendants in some amount, the amount to be determined by the jury;

(d) No ruling is made as to whether the pleadings and evidence of defendants do or do not present matters in mitigation.

This 12 December 1972.

Durwood Pye, Judge Superior Court

Filed in Office December 13, 1972.

Bo Langly, Deputy Clerk, Superior Court of Fulton County.

Martin Cohn
Cox Broadcasting Corporation
B-74692

CERTIFICATE OF SERVICE

I hereby certify that I have this day served Kirk McAlpin of the firm of King and Spalding, attorney for the Defendants, and Stephen Land of the firm of Zachary and Land, attorney for the Plaintiff, in the above styled case with exact copies of the foregoing "Order on Motion for Summary Judgment filed by said Plaintiff and said Defendants" signed December 12, 1972 by Judge Durwood T. Pye and filed on December 13, 1972, by placing same in properly addressed envelopes in the United States Mail with adequate postage thereon.

This the 13th day of December, 1972.

Bo Langly, Deputy Clerk, Superior Court of Fulton County, Atlanta Judicial Circuit.

IN THE

SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

File No. B-74692

MARTIN COHN,
Plaintiff,

vs.

COX BROADCASTING CORPORATION and
THOMAS WASSELL,
Defendants.

ORDER UPON HEARING OF DEFENDANTS' MOTION TO RECONSIDER FILED DECEMBER 22, 1972

Upon consideration of said motion on the briefs of counsel, and the oral arguments of counsel, the Court has undertaken to review its previous order and to consider all points made in the motion; and is constrained to adhere to its previous order and ruling and it is so ordered by the Court.

Upon presentation of a certificate of immediate review, if such is desired, immediate review will be ordered.

This 29 December, 1972.

Durwood Pye, Judge
Superior Court

IN THE

SUPREME COURT OF GEORGIA

27880.

COX BROADCASTING CORPORATION, et al. v COHN (612)
Decided September 5, 1973.

GUNTER, Justice. This appeal involves the alleged invasion of "the right to be left alone". The cause of action involved is also referred to as an invasion of the right of privacy, or the tort of public disclosure.

On August 18, 1971, the Appellee's seventeen year old daughter was the victim of the crime of rape. Her death immediately followed. Six young men were subsequently indicted for murder and rape.

The rape and death of the rape-victim were widely publicized immediately after the occurrence of these events. However, apparently because of a Georgia statute (Code § 26-9901) the identity of the female victim was not disclosed by any of the news media. That Georgia statute is as follows:

> "It shall be unlawful for any news media or any other person to print and publish, broadcast, televise or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State

the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor."

Approximately eight months after the commission of the alleged crimes, the six young men were involved in court proceedings pursuant to the indictments returned against them. On the same day of the court proceedings, April 10, 1972, and on the following day, April 11, 1972, the Appellant broadcasting company and its agent-reporter originated a telecast from the courthouse which disclosed the identity of the deceased rape-victim.

That telecast in part contained the following:

"Six youths went on trial today for the murder-rape of a teenaged girl.

"The six Sandy Springs high school boys were charged with murder and rape in the death of seventeen year old Cynthia Cohn following a drinking party last August 18.

"The tragic death of the high school girl shocked the entire Sandy Springs community. Today the six boys had their day in court.

"There was no jury. The six boys through their lawyers, threw themselves on the mercy of the court . . . and the presiding judge, Sam Phillips McKenzie.

"The prosecutor, assistant Attorney General John Nuckolls said the girl had apparently drank [sic] a considerable amount of vodka attending a private party. He said the girl was taken to a wooded area and raped. She passed out . . . and the liquids in her stomach were forced upward causing suffocation. The exact cause of death . . . that is whether the rape caused death he said would be difficult to prove.

"Judge McKenzie dropped the murder charge against all six . . . and proceeded with the charge of rape. The DA told the judge all six defendants wished to plead guilty . . . and not have a jury trial. The DA told the court the girl's family felt that a lenient five year sentence would serve justice and he recommended a five year sentence."

The rest of the telecast, too lengthy to quote here, dealt with the names of the young men and the sentences that they received.

On May 8, 1972, the Appellee brought an action for money damages against the broadcasting company and its reporter for having invaded his right to privacy by publishing the identity of his deceased daughter in connection with the circumstances related to the telecast.

There being no material dispute about the facts, both sides filed motions for summary judgment in the trial court. The Appellants' motion for summary judgment was denied, and the Appellee's motion for summary judgment was granted as to liability on the part of Appellants, leaving for future determination

in the trial court the amount of damages recoverable by the Appellee. The trial court granted a certificate for immediate review, and we must now decide whether the trial court's partial summary judgment establishing liability on the part of the Appellants was correct.

We must reverse the judgment below and remand the case for further proceedings consistent with this opinion.

I.

The trial court apparently granted summary judgment as to liability against the Appellants on the theory that the Georgia statute which prohibits disclosure of the identity of a rape victim gives rise to a civil cause of action in favor of the victim and, in this case, the father of a deceased victim against the party making the disclosure; and there being no question about the disclosure in this case, the trial court determined liability to exist against the disclosing parties as a matter of law.

We disagree with the trial court on this score. This Georgia statute and its predecessor, formerly codified as Code § 26-2105, are penal in nature, and while these statutes establish the public policy of this state on this subject, neither of them created a civil cause of action for damages in favor of the victim or anyone else.

Since we rule that the statute did not create a civil cause of action, it is unnecessary for us to consider and rule on the various constitutional attacks made on the statute by the Appellants.

II.

Aside from the statute, did the Appellee's complaint filed in the trial court state a cause of action for invasion of the Appellee's right to be left alone, or for the invasion of the Appellee's right of privacy, or for the tort of public disclosure?

This tort, by whatever name it may be called, though relatively new in the entire history of the Common Law, has been recognized in this jurisdiction since 1905. This tort, though fathered by Messrs. Warren and Brandeis in a remarkable law review article published in 1890, was birthed by this Court, in *Pavesich v. New England Life Insurance Company*, 122 Ga. 190, 50 SE 68, (1905). See Dean Wade's article, *Defamation and the Right to Privacy*, 15 Vanderbilt Law Review 1093 (October, 1962).

Dean Prosser, in his law review article entitled *Privacy* in 48 California L. Rev. (August, 1960), said that *Pavesich* initially recognized the existence of a distinct right of privacy and thus became the leading case on the subject. He further said in that article:

> "Along in the thirties, with the benediction of the *Restatement of Torts*, the tide set in strongly in favor of recognition, and the rejecting decisions began to be overruled. At the present time the right of privacy, in one form or another, is declared to exist by the overwhelming majority of the American courts."

Mr. Justice Peters of the California Supreme Court in a relatively recent case, *Briscoe v. Reader's Digest Association*, 483 P. 2d 34, (1971), said:

> "A common law right to privacy, based on Warren and Brandeis' article, is now recognized in at least thirty-six states."

We therefore adhere to our *Pavesich* beginnings and reiterate that this common law tort exists in this jurisdiction without the help of the statute that the trial judge in this case relied on.

III.

Does the father of a deceased minor child have a cause of action in tort by virtue of the public disclosure of the identity of his daughter as the victim of a sex crime and the unpleasant circumstances connected therewith, all of which occurred approximately eight months prior to the public disclosure of his daughter's involvement?

It is clear that the female victim's privacy was not invaded in this case. She had been dead some eight months prior to her identity and involvement being publicly disclosed.

The surviving father of the deceased daughter asserts that the tort was perpetrated directly upon him. He contends that the public disclosure of the identity and involvement of his daughter eight months after the fact invaded his right to privacy and intruded upon his right to be left alone, free from and unconnected with the sad and unpleasant event that had previously occurred.

A cause of action asserted by a close relative is sometimes called a "relational" right to privacy. Dean Green delved into the subject of relational interests in a law review article published in 1934. 29 Illinois L. Rev. 460. The beginning paragraph of that article is as follows:

> "The value of the relational interest in dealing with tort cases has not been generally recognized. It has been in large measure ignored or else classified as a property interest. It deserves a place alongside of personality and property. It fills an indispensable place in tort classification."

Later in the article at page 487, he said:

> "It is not a situation of hurting the plaintiff's personality or harming the plaintiff's property. It is, strictly speaking, a hurt to the relational interest of the plaintiff — his interest in a deceased relative — and on the basis of recovery is not only warranted on behalf of a plaintiff, but is further warranted on the basis of condemning or penalizing the inconsiderate conduct of the defendant where such tender relations are involved."

See also in this connection the Note by Robert P. Kennedy entitled "The Right to Privacy in the Name, Reputation and Personality of a Deceased Relative" in 40 Notre Dame Lawyer 324, (April, 1965).

This jurisdiction is not without precedent in the "relational" area of the law. In *Bazemore, et. al. v.*

Savannah Hospital, et al., 171 Ga. 257, 155 SE 194 (1930), the parents of a deceased infant with an unusual birth defect sued a hospital, a photographer, and a newspaper for invasion of their privacy by publishing, or aiding the disclosure and publication of, a photograph depicting their deformed infant. The opinion by this Court said:

> "In this case the child was dead when the unauthorized acts were committed, and the right of action could not be in the child, but in the parents .... The petition in this case by the parents of a deceased child for general and special damages to the plaintiffs, and for injunction because of the alleged tortious act, set forth a cause of action."

The complaint in the case had sought money damages against all three of the defendants jointly and severally. This Court held that the complaint stated a cause of action against all three defendants.

The Appellants in the case at bar contend that *Bazemore* is not authority for the existence of the "relational" right in this state. They argue that the decision turned on a breach by the hospital of its contractual and ethical obligation to the parents of the infant and that the photographer and the newspaper had wilfully participated in such breach. We are not persuaded by this argument.

Bazemore said that the parents of the deceased infant had a cause of action against the newspaper because of its public disclosure which affected them, the parents. As we read *Bazemore*, how that public disclosure by the newspaper came about, whether by

breach of contractual and ethical obligations or otherwise, was immaterial. A newspaper made a public disclosure concerning a deformed, deceased infant of surviving parents. Such disclosure allegedly affected the surviving parents in an adverse manner. The surviving parents' complaint properly stated a cause of action against the newspaper.

In the case at bar we hold that the Appellee's complaint properly stated a cause of action, whether it be denominated "relational" or not, against the Appellants.

IV.

Although the Appellee's complaint in this case stated a claim for relief, the public disclosure, admitted by the Appellants, did not establish liability on the part of the Appellants as a matter of law. Whether the public disclosure actually invaded the Appellee's "zone of privacy", and if so to what extent, are issues to be determined by the fact-finder. And in formulating such an issue for determination by the fact-finder, it is reasonable to require the Appellee to prove that the Appellants invaded his privacy with wilful or negligent disregard for the fact that reasonable men would find the invasion highly offensive.

V.

We now turn to the head-on collision between the tort of public disclosure and First Amendment rights of freedom of speech and press.

Georgia's Constitution says:

"No law shall ever be passed to curtail, or restrain the liberty of speech, or of the press; any person may speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that liberty*". Ga. Code § 2-115.

Georgia's Constitution also says:

"Protection to person and property is the paramount duty of government, and shall be impartial and complete." Code § 2-102.

The protections to speech and press contained in the First Amendment to the Constitution of the United States are made applicable to the State of Georgia by the Fourteenth Amendment. However, despite the late Mr. Justice Black's absolutist position with regard to the First Amendment, we know that his position has never been adopted by the Supreme Court of the United States. There are a number of legitimate limitations on speech which are not proscribed by the First Amendment. These limitations are generally set forth by Professor Leflar in *The Free-ness of Free Speech*, 15 Vanderbilt L. Rev. 1073, (October, 1962). In that article the author discussed the freedom of speech requirement of the First Amendment, and he determined that this constitutional guarantee is not absolute. He further concluded that the court should weigh the conflicting societal values of the present day in reaching a decision as to whether the particular speech in issue is protected by the First Amendment. On page 1083 of that article Professor Leflar said:

"How then do we, or should we, make our specific judgment? How do we while effectuating our ideal, or perhaps only pretending to effectuate it, pick out the situations in which free speaking will be penalized?

"One mass of cases is easy. Neither frauds nor perjuries nor most defamations have within them any of the social values for which our ideal demands protection. The libel or slander which seeks acceptance of no cultural, political, social or ethical attitude, which urges upon the group no controversial idea or opinion, which seeks nothing beyond private benefit to the speaker or harm to others, does not come within the ideal at all. It deserves no constitutional protection, and receives none."

The Supreme Court of Wisconsin in *State v. Evjue*, 33 NW 2d 205, (1948), upheld the constitutionality of that state's statute prohibiting disclosure of the identity of a rape victim against all First Amendment attacks. Also, in *Nappier v. Jefferson Standard Life Insurance Company*, 322 Fed. 2d 502, (1963), the contention was made that the disclosure of a rape victim's identity was a matter of public concern and record so as to be exempted from South Carolina's non-disclosure statute and from the rule of privacy. The Fourth Circuit handled this argument as follows:

"The ready replication is that the statute states an exception to the exemption. No matter the news value, South Carolina has unequivocally declared the identity of the injured person shall not be made known in press or broadcast . . . . No constitutional

infringement has been suggested. Indeed, Standard conceded in oral argument that if the broadcast did in fact and in law 'name' the plaintiffs, then they had a right of action."

A Note in Yale Law Journal (June, 1973) makes a rather convincing argument that there is a First Amendment interest in protecting the privacy of the individual which is on a par with the First Amendment interest which permits disclosure of the identity of a person whose privacy will be invaded by such disclosure. The contention is there made that there must be a balancing by the courts of these two constitutional interests.

In *Briscoe, supra*, the Supreme Court of California held that a plaintiff, convicted of a crime eleven years earlier, had a claim for invasion of privacy by virtue of the disclosure of his identity eleven years after the fact.

That Court said:

"But men are not so divine as to forgive the past trespasses of others, and plaintiff therefore endeavored to reveal as little as possible of his past life. Yet, as if in some bizarre canyon of echoes, petitioner's past life pursues him through the pages of the *Reader's Digest*, now published in thirteen languages and distributed in one hundred nations, with a circulation in California alone of almost two million copies."

The Court in *Briscoe* then went on to say:

"But the rights guaranteed by the First Amendment do not require total abrogation of the right to privacy. The goal sought by each may be achieved with a minimum of intrusion upon the other."

We agree. First Amendment proscriptions do not bar the claim of the Appellee against the Appellants in this case.

VI.

To conclude: The trial court correctly denied the motion of Appellants for summary judgment; the trial court erroneously granted the Appellee's motion for partial summary judgment; and the case is remanded to the trial court for further proceedings consistent with this opinion.

Judgment affirmed in part, reversed in part, and remanded with direction. All the Justices concur except Grice, P. J., Undercofler, J. and Jordan, J. J. who dissent.

27880.

COX BROADCASTING CO. v. COHN.

UNDERCOFLER, Justice, dissenting. The majority opinion ignores the established rule in Georgia that "where an incident is a matter of public interest, or the subject of a public investigation, a publication in connection therewith can be a violation of no one's legal right of privacy." *Waters v. Fleetwood*, 212 Ga. 161, 167 (91 SE2d 344, 348). This qualification on the public disclosure tort comports with the overwhelming majority of cases that have considered the public interest aspect of a publication. See Prosser, *Law of Torts* 823-33 (4th ed. 1971); 18 ALR3rd 875, 882-84. Indeed, the American Law Institute has recognized and approved this qualification, and has taken the position that persons who reluctantly become subjects of public interest by virtue of some "striking catastrophe" are nevertheless "subject to the privileges which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains and victims." *Restatement of Torts* § 867, comment c (1939).

The public interest qualification is grounded in the rights of freedom of press and speech granted in both the Georgia Constitution and the First Amendment to the Federal Constitution. In reference to these fundamental freedoms this Court said in *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 204 (50 SE 68, 74), that "[t]he truth may be spoken, written, or printed about all matters of a public nature, as well as matters of a private nature in which the public has a legitimate interest." The constitutional freedoms of press and speech are so jealously guarded

that even publication of *false* reports of matters of public interest are privileged absent a showing that the defendant "published the report with knowledge of its falsity or in reckless disregard of the truth." *Time, Inc. v. Hill*, 385 U.S. 374, 388. Certainly the publication of true information regarding a matter of public interest can be no less privileged. The constitutional privilege is controlling regardless of whether recovery would be predicated on violation of statute, or on some theory akin to negligence *per se* with the statute providing the duty or standard of care owed the plaintiff, or, as the majority would have it, on the basis "that reasonable men would find the invasion highly offensive."

I am authorized to state that Presiding Justice Grice and Justice Jordan concur in this dissent.

IN THE

SUPREME COURT OF GEORGIA

27880. COX BROADCASTING CORPORATION, ET AL. v. COHN (612)

Rehearing Denied September 19, 1973.

ON MOTION FOR REHEARING

GUNTER, Justice. The Appellants have filed a motion for rehearing in which they contend that their motion for summary judgment in the trial court should have been granted because the public disclosure or publication in this case was a matter of public interest or general concern.

This argument overlooks the fact that the 1968 statute (Code § 26-9901) enacted by the Georgia Legislature declared that the identity of a female victim of the crime of rape shall not be disclosed by the news media. In the original opinion we held that this statute established the public policy of Georgia on this subject. This statute does not prevent disclosure or publication of "the event"; it merely prohibits the disclosure or publication of the identity of the victim of the event.

Implicit, though not explicit, in the Appellants' argument is that this Court should declare this 1968 statute unconstitutional as violative of the First Amendment.

A majority of this Court does not consider this statute to be in conflict with the First Amendment. We think the General Assembly of Georgia had a

perfect right to declare that the victim of such a crime should not be publicly identified by the news media. The First Amendment is not absolute; and we consider this statute to be a legitimate limitation on the right of freedom of expression contained in the First Amendment.

There simply is no public interest or general concern about the identity of the victim of such a crime as will make the right to disclose the identity of the victim rise to the level of First Amendment protection.

No case has been cited to us, and we have found none, declaring such a statute to be unconstitutional. To the contrary, the Supreme Court of Wisconsin in *Evjue*, cited in the original opinion, said:

> "It is considered that there is a minimum of social value in the publication of the identity of a female in connection with such an outrage. Certain it is that the legislature could so find. At most the publication of the identity of the female ministers to a morbid desire to connect the details of one of the most detestable crimes known to the law with the identity of the victim. When the situation of the victim of the assault and the handicap prosecuting officers labor under in such cases is weighed against the benefit of publishing the identity of the victim in connection with the details of the crime, there can be no doubt that the slight restriction of the freedom of the press prescribed by section 348.412 is fully justified.
>
> We find no ground upon which section 348.412 may be held invalid."

We hold that this 1968 Georgia statute is not unconstitutional, and because of this statute the disclosure of the identity of the victim of such a crime is not a matter of public interest and general concern in this state.

The motion for rehearing is denied.

IN THE

SUPREME COURT OF GEORGIA

CASE NO. 27880

COX BROADCASTING CORPORATION and
THOMAS WASSELL,

Appellants,

v.

MARTIN COHN,

Appellee.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

TO: MARTIN COHN, Appellee in the
above-captioned matter and his
attorney, STEPHEN A. LAND,
Zachry & Land, Suite 1704,
Fulton National Bank Building,
Atlanta, Georgia 30303

NOTICE IS HEREBY GIVEN that the COX BROADCASTING CORPORATION and THOMAS WASSELL, appellants in the above-captioned cause, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Georgia affirming in part, reversing in part and remanding with direction, entered in this action on September 5, 1973.

FURTHER NOTICE IS HEREBY GIVEN that the COX BROADCASTING CORPORATION and THOMAS WASSELL, appellants in the above-captioned cause, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Georgia denying rehearing of the decision of the Supreme Court of Georgia decided on September 5, 1973, such judgment being entered in this action on September 19, 1973.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

DATED: December 6, 1973.

KING & SPALDING

/s/ KIRK M. MCALPIN

/s/ JOHN A. PICKENS

/s/ JOSEPH R. BANKOFF

Attorneys for Appellants

2500 Trust Company of
Georgia Building
Atlanta, Georgia 30303
404/658-1350

Filed in Office
December 6, 1973
HAZEL E. HALLFORD
Deputy Clerk of Supreme
Court of Georgia

IN THE

SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

CIVIL ACTION NO. B-74692

MARTIN COHN,

Plantiff,

v.

COX BROADCASTING CORPORATION
and THOMAS WASSELL,

Defendants.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

TO: MARTIN COHN, Appellee in the above-captioned matter and his attorney, STEPHEN A. LAND, Zachry & Land, Suite 1704 Fulton National Bank Building Atlanta, Georgia 30303

NOTICE IS HEREBY GIVEN that the COX BROADCASTING CORPORATION and THOMAS WASSELL, appellants in the above-captioned cause, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Georgia affirming in part, reversing in part and remanding with direction, entered in this action on September 5, 1973.

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DATED: December 6, 1973.

KING & SPALDING

/s/ KIRK M. MCALPIN

/s/ JOHN A. PICKENS

/s/ JOSEPH R. BANKOFF

Attorneys for Appellants

2500 Trust Company of
Georgia Building
Atlanta, Georgia 30303
404/658-1350

Filed in office this the 6th day of December, 1973.

LORA PASCHAL
Deputy Clerk

Supreme Court, U. S.
FILED
MAY 6 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM 1973

No. 73-938

COX BROADCASTING CORPORATION AND THOMAS WASSELL,
Appellants,

vs.

MARTIN COHN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

APPENDIX

Appeal Docketed December 17, 1973
Jurisdiction Postponed February 19, 1974

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CHRONOLOGICAL LIST OF IMPORTANT DATES

1. May 8, 1972—Complaint filed in the Superior Court of Fulton County.
2. June 7, 1972—Answer of Defendants Cox Broadcasting Corporation and Thomas Wassell filed in the Superior Court of Fulton County.
3. July 13, 1972—Plaintiff Martin Cohn's Motion for Summary Judgment filed.
4. July 13, 1972—Affidavit of John A. Nuckolls filed.
5. August 14, 1972—Defendants' Affidavit of Thomas Wassell in Opposition To the Plaintiff's Motion for Summary Judgment filed.
6. August 14, 1972—Motion of Defendants Cox Broadcasting Corporation and Thomas Wassell for Summary Judgment filed.
7. August 14, 1972—Motion of Defendants Cox Broadcasting Corporation and Thomas Wassell to Strike the Affidavit of John Nuckolls filed.
8. August 14, 1972—Response of Defendants Cox Broadcasting Corporation and Thomas Wassell to Plaintiff's Motion for Summary Judgment filed.
9. September 29, 1972—Plaintiff's Affidavit of Martin Cohn in Support of His Motion for Summary Judgment filed.
10. October 2, 1972—Plaintiff's Amended Affidavit of John Nuckolls in Support of Plaintiff's Motion for Summary Judgment filed.
11. October 5, 1972—Plaintiff's Amended Motion for Summary Judgment filed.
12. October 24, 1972—Motion of Defendants Cox Broadcasting Corporation and Thomas Wassell to Strike the Affidavit of Plaintiff Martin Cohn filed.

13. October 24, 1972—Motion of Defendants Cox Broadcasting Corporation and Thomas Wassell to Strike and to Renew Their Motion to Strike the Original and the Amended Affidavits of John Nuckolls filed.
14. October 24, 1972—Amendment to Answer of Defendants Cox Broadcasting Corporation and Thomas Wassell filed.
15. December 13, 1972—Order of the Fulton County Superior Court on Motion for Summary Judgment filed by said Plaintiff and said Defendants filed.
16. December 22, 1972—Defendants' Motion to Reconsider filed.
17. December 29, 1972—Order of the Fulton County Superior Court Upon Hearing of Defendants' Motion to Reconsider filed.
18. December 29, 1972—Certificate of Appealability of Order Upon Hearing of Defendants' Motion to Reconsider filed.
19. January 9, 1973—Notice of Appeal to the Supreme Court of Georgia filed.
20. September 5, 1973—Opinion of the Supreme Court of Georgia filed.
21. September 5, 1973—Judgment of the Supreme Court Affirming in Part and Reversing in Part with Directions Entered.
22. September 14, 1973—Motion of Appellants Cox Broadcasting and Thomas Wassell for Rehearing filed.
23. September 19, 1973—Opinion of the Supreme Court of Georgia on Motion for Rehearing filed.
24. September 19, 1973—Judgment of the Supreme Court of Georgia Denying Appellants' Motion for Rehearing Entered.

25. December 6, 1973—Notice of Appeal to the United States Supreme Court filed.
26. December 17, 1973—Appeal Docketed in the United States Supreme Court.
27. February 19, 1974—Jurisdiction Postponed to the Hearing on the Merits by the United States Supreme Court.

COMPLAINT

(Filed May 8, 1972)

Now comes the Plaintiff in the above-styled Complaint and respectfully shows the following:

ONE

The Defendant, Cox Broadcasting Corporation is a Corporation established under the laws of the State of Georgia with its principal office located at 1601 West Peachtree Street, N. E., Atlanta, Fulton County, Georgia. J. Leonard Reinsch has been designated as the person upon whom service of process may be perfected. The Defendant is therefore subject to the jurisdiction of this Court.

TWO

The Defendant Thomas Wassell is a resident of DeKalb County, Georgia and may be served by a second original of this Complaint.

THREE

On April 10, 1972 and on April 11, 1972, the Defendants willfully, wrongfully, deliberately, and unlawfully caused to be televised and did televise in two newscasts the name of Cindy Cohn, also known as Cynthia Leslie

Cohn the victim of a rape and attempted rape, and the daughter of the Plaintiff herein, contrary to Ga. Code Ann. §26-9901 (Acts 1968, pp. 1249, 1335) thereby disseminating to the public the identity of a female who was raped and upon whom an assault with intent to commit rape was made.

FOUR

On April 10, 1972 and on April 11, 1972 the Defendants willfully, or recklessly or negligently caused to be televised and did televise in two newscasts the name of Cindy Cohn, the victim of a rape and attempted rape and the daughter of the Plaintiff herein, thereby disseminating to the public the identity of a female who was raped and upon whom an assault with intent to commit rape was made.

FIVE

As a result Plaintiff's right to privacy has been invaded and he has suffered great humiliation, pain and suffering of body and mind, has been prevented from transacting his business in a normal manner, and his peace and happiness of mind have been destroyed.

WHEREFORE, Plaintiff demands the following:

1. Judgment for damages against Defendant Cox Broadcasting Corporation or Defendant Thomas Wassell, or both in the sum of $1,000,000.00 and costs.

2. That the Court temporarily restrain Defendant Cox Broadcasting Corporation and its officers, agents or employees from doing any act that would destroy, erase, mutilate or in any way dispose of the video tape recordings of the newscasts referred to herein and to deliver to the Court as quickly as possible but not later than May 11,

1972 the said video tapes to be held and impounded by the Court as evidence until further order or final disposition of this Complaint.

Zachry & Land
By /s/ Stephen A. Land,
Attorney for Plaintiff

1704 Fulton National Bank Bldg.
Atlanta, Georgia
577-6072

(Summons Omitted)

(Caption Omitted)

ANSWER OF DEFENDANTS COX BROADCASTING CORPORATIONS AND THOMAS WASSELL

(Filed June 7, 1972)

COME NOW COX BROADCASTING CORPORATION and THOMAS WASSELL, defendants in the above-styled action, and make and file this their answer to plaintiff's complaint and respectfully show the Court the following:

FIRST DEFENSE

Plaintiff's complaint fails to state a claim against defendants upon which relief can be granted.

SECOND DEFENSE

1.

Defendants admit the allegations of paragraph one of plaintiff's complaint.

2.

Defendants admit the allegations of paragraph two of plaintiff's complaint.

3.

Answering the allegations of paragraph three of plaintiff's complaint, defendants admit that they caused to be televised and did televise a newscast at approximately 6:00 P.M. on April 10, 1972 and at approximately 12:15 A.M. on April 11, 1972, wherein the name of the said Cynthia Cohn was mentioned once and defendants further admit that the said Cynthia (Cindy) Leslie Cohn was the daughter of plaintiff and was the purported victim of a rape and attempted rape; defendants deny that the said newscasts televised on April 10, 1972 and April 11, 1972, were televised or caused to be televised wilfully, wrongfully, deliberately, unlawfully or contrary to Ga. Code Ann. §26-9901; defendants further aver that in televising or causing to be televised the said newcasts wherein the name of the said Cynthia Cohn was mentioned, defendants were reporting on the public trial of the six youths indicted by the Grand Jury of Fulton County, Georgia, for the murder and rape of the said Cynthia Cohn, the trial having been conducted at the Fulton County Courthouse before the Honorable Judge Sam Phillips McKenzie on April 10, 1972, and in so reporting defendants' actions are privileged in that the said newscasts were fair and honest reports of the said judicial proceedings, of matters emanating from information received through an official investigation by police authorities, and of a matter of public or general concern, and accordingly, defendants are not liable in any manner or for any reason whatsoever for causing to be televised or for televising the said newscasts on April 10, 1972 and on April 11, 1972; defendants deny each and every

allegation of said paragraph which has not herein been expressly admitted.

4.

Answering the allegations of paragraph four of plaintiff's complaint, defendants admit that they caused to be televised and did televise a newscast at approximately 6:00 P.M. on April 10, 1972 and at approximately 12:15 A.M. on April 11, 1972, wherein the name of the said Cynthia Cohn was mentioned once, and defendants further admit that the said Cynthia (Cindy) Leslie Cohn was the daughter of plaintiff and was the purported victim of a rape or attempted rape; defendants deny that the said newscasts televised on April 10, 1972 and on April 11, 1972 were televised or caused to be televised wilfully, recklessly or negligently; defendants further aver that in televising or causing to be televised the said newscasts wherein the name of the said Cynthia Cohn was mentioned, defendants were reporting on the public trial of the six youths indicted by the Grand Jury of Fulton County, Georgia, for the murder and rape of the said Cynthia Cohn, the trial having been conducted at the Fulton County Courthouse before the Honorable Judge Sam Phillips McKenzie on April 10, 1972, and in so reporting defendants' actions are privileged in that the said newscasts were fair and honest reports of the said judicial proceedings, of matters emanating from information received through an official investigation by police authorities, and of a matter of public or general concern, and accordingly, defendants are not liable in any manner or for any reason whatsoever for causing to be televised or for televising the said newscasts on April 10, 1972 and April 11, 1972; defendants deny each and every allegation of said paragraph which has not herein been expressly admitted.

5.

Defendants deny the allegations of paragraph five of plaintiff's complaint; defendants further aver that their actions in televising or causing to be televised the said newscasts on April 10, 1972 and on April 11, 1972 did not in any way invade any purported right of privacy of whatever nature, if any there be, allegedly possessed by plaintiff, the existence of which defendants deny, and further aver that defendants' alleged acts were not the direct or proximate cause of any alleged injury to the plaintiff, if any there be.

THIRD DEFENSE

Defendant Cox Broadcasting Corporation is licensed as a television station (WSB-TV) by the Federal Communications Commission and under the terms of the Federal Communications Act it is obligated to conduct itself in the public interest by impartially reporting newsworthy events, the indictment of the six youths indicted by the Grand Jury of Fulton County, Georgia, for the murder and rape of the said Cynthia Cohn and the subsequent trial at the Fulton County Courthouse before the Honorable Judge Sam Phillips McKenzie on April 10, 1972, being such a newsworthy event, and defendant Thomas Wassell, being an employee of defendant Cox Broadcasting Corporation, is likewise obligated to conduct himself in the public interest by impartially reporting such newsworthy events.

FOURTH DEFENSE

Defendants are not liable in any manner or amount to plaintiff, and defendants further show that their televising or causing to be televised the said newscast on April 10, 1972 and April 11, 1972, was for the sole purpose of truthfully reporting to the public a newsworthy event

in fulfillment of their duty to the public and the same being privileged.

FIFTH DEFENSE

Defendants' actions in televising or causing to be televised on April 10, 1972 and on April 11, 1972, the said newscast relating to the trial of the six youths indicted by the Grand Jury of Fulton County, Georgia, for the murder and rape of the said Cynthia Cohn, the same being a matter of public or general concern, are protected and privileged under the First and Fourteenth Amendments to the Constitution of the United States, Article I, Section I, Paragraph XV of the Constitution of the State of Georgia, and Ga. Code Ann. §§105-704, 709(4), which afford defendants the privilege to disseminate to the public fair and honest reports pertaining to judicial proceedings, to matters emanating from information received through an official investigation by police authorities, and to matters of public or general concern, and accordingly, defendants are not liable to plaintiff in any manner or for any reason whatsoever.

SIXTH DEFENSE

Defendants' actions in televising or causing to be televised the said newscast on April 10, 1972 and on April 11, 1972 are not violative of Ga. Code Ann. §26-9901 and no civil cause of action predicated on such an alleged violation lies against defendants in that the said statute is a criminal statute and provides only that violation thereof is to be punished as for a misdemeanor, such punishment being the exclusive sanction imposed under said statute, and accordingly, plaintiff has no right of action in this cause.

SEVENTH DEFENSE

Defendants neither had nor have any malice toward plaintiff or plaintiff's deceased daughter, Cynthia Cohn, and, in televising or causing to be televised the said newscast on April 10, 1972 and on April 11, 1972, relating to the trial of the six youths indicted by the Grand Jury of Fulton County, Georgia, for the murder and rape of the said Cynthia Cohn, defendants, at all times, acted in a fair, reasonable and diligent manner to obtain the facts related thereto and to report fully and truthfully a matter of public concern.

EIGHTH DEFENSE

Plaintiff is not in anywise entitled to any of the relief sought as against defendants in this cause.

WHEREFORE, defendants COX BROADCASTING CORPORATION and THOMAS WASSELL, respectfully pray for judgment dismissing plaintiff's complaint, with costs set against plaintiff, and that they have such other and further relief as may be just and equitable in the premises.

King & Spalding
/s/ Kirk M. McAlpin
/s/ John A. Pickens
Attorneys for Defendants Cox Broadcasting Corporation and Thomas Wassell

2500 Trust Company of Georgia Building
Atlanta, Georgia 30303
Tel: (404) 577-5350

(Certificate of Service Omitted)

(Caption Omitted)

MOTION FOR SUMMARY JUDGMENT OF MARTIN COHN

(Filed July 13, 1972)

Comes now the Plaintiff, Martin Cohn, and moves this Court pursuant to Ga. Code Ann. §81A-156 (Ga. Laws 1966, pp. 609, 660; pp. 226, 238) for Summary Judgment in his favor on the following grounds:

There exists in this case no genuine issue as to any material fact other than the amount of damages; therefore the Plaintiff is entitled to a judgment as to liability as a matter of law.

Zachry & Land
By: /s/ Stephen A. Land

1505 Fulton Nat'l Bank Bldg.
Atlanta, Georgia 30303
577-6072

(Certificate of Service Omitted)

(Caption Omitted)

AFFIDAVIT OF JOHN A. NUCKOLLS

(Filed July 13, 1972)

Personally before me, the undersigned attesting officer, appeared John A. Nuckolls, who upon being first duly sworn, deposes and states the following:

ONE

Affiant makes this Affidavit in the above entitled action to be used as evidence on behalf of the Plaintiff in any hearing or motion, including summary judgment and for any other lawful purpose.

TWO

Affiant is a resident of 6429 Cherry Tree Lane, Atlanta, Georgia and was employed by Fulton County, Georgia as an Assistant District Attorney for four and one-half years from January 10, 1968 until June 30, 1972.

THREE

In February of 1972, Affiant was assigned to handle the prosecution of Peter Manchee, Ronnie Longo, Bruce Howard, Joe Thompson, Craig Wozniak and Bobby Ray King, all of whom had been indicted by the Fulton County Grand Jury for the crimes of Rape and Felony Murder of Cynthia Lesley Cohn, a female of the age of seventeen years.

FOUR

On April 10, 1972 the above referred to Defendants were arraigned before Judge Sam Phillips McKenzie of the Fulton Superior Court who agreed to affiant's motion of nolle prosequi to the felony murder indictments.

FIVE

After disposing of the murder indictments as stated above, each Defendant was separately arraigned on the charge of rape and, after a lengthy hearing, Judge McKenzie accepted pleas of guilty of rape from Peter Manchee, Craig Wozniak and Bruce Howard, and pleas of guilty to attempted rape from Ronnie Longo and Bobby Ray King.

SIX

Present during the foregoing proceedings were representatives of WSB Television, including Thomas Wassell.

SEVEN

Shortly after 6:00 P.M. on April 10, 1972, following sentencing of the aforementioned Defendants, WSB Television gave television coverage, personally witnessed by Affiant, in which the said Thomas Wassell appeared on the steps of the Fulton County Courthouse and related the circumstances of the proceedings before Judge McKenzie described above.

EIGHT

In the said broadcast, Affiant personally heard Thomas Wassell, who is a Defendant in this case, state that the Defendants had pled guilty to raping a 17 year old North Springs girl by the name of Cindy Cohn.

NINE

Immediately following the said telecast Affiant received a telephone call from Mr. Martin Cohn, Plaintiff in this case and the father of Cindy Cohn, the victim of the rape mentioned by name on the said telecast. Mr. Cohn appeared to Affiant to be nearly hysterical and his voice seemed almost uncontrollable. He asked Affiant whether something could be done to stop the telecast and made the comment several times that "this is killing me, this is killing me."

TEN

Affiant assured Mr. Cohn that the telecast was hopefully an oversight and that certainly the comments would be edited and reference to his daughter Cindy deleted on subsequent telecasts.

ELEVEN

Affiant watched the telecast of the Academy Awards until approximately 12:15 A.M. on April 11, 1972 and observed, at about 12:15 A.M. the late news telecast on WSB Television, during which the same broadcast by Thomas Wassell was repeated, including the name of Cindy Cohn, victim of the aforementioned rape.

TWELVE

The following morning, on April 11, 1972 Affiant personally saw Thomas Wassell in the Chambers of Judge Sam Phillips McKenzie in the Fulton County Courthouse. Affiant asked the said Thomas Wassell if he had purposely used Cindy Cohn's name, pointing out to him that his actions were in violation of Georgia law. Mr. Wassell replied that the name had already been released to which Affiant replied that to his knowledge it had not been publicly disseminated.

THIRTEEN

Upon telling Mr. Wassell that the name of Cindy Cohn had not been publicly disseminated he appeared to be greatly concerned and stated he was leaving to see his attorneys immediately.

FOURTEEN

Affiant had the opportunity to see and observe Martin Cohn on numerous occasions, both before and after the telecasts of April 10, 1972 and April 11, 1972, and Affiant states that although Mr. Cohn was upset and heartbroken about the tragedy to his daughter before the said telecasts it was always possible to communicate with him rationally. After the telecasts, it became extremely difficult for Affiant to communicate with Mr. Cohn. In discussions concerning the disposition of the charges against the remaining Defendant, Mr. Cohn was extremely upset and concerned over the possibility of similar publicity developing at the trial. Because of his obvious and expressed apprehension of a repeat of such telecasts, discussions concerning alternatives in the case were conducted with the greatest of difficulty. During these discussions Cohn constantly expressed concern there would be further publicity if a trial were the result, rather than recommending a plea to a lesser sentence. He stated that his wife urged asking Affiant to accept a plea to terminate all cases, and end the publicity. He further stated with great emotion that he was torn between seeking justice for his daughter or the well being of his family.

Shortly after the release of Cindy Cohn's name as the victim in the case, Martin Cohn contacted Affiant relative to telephone calls which he described as obscene and inhumane. He expressed concern for his family over these calls. Affiant suggested that a non-disconnect device could be installed to trace the calls but he said he would just rather leave home with his family than answer any more.

/s/ John A. Nuckolls

Sworn to and subscribed before me this 11th day of July, 1972.

/s/ Linda B. Sinclair

(Caption Omitted)

DEFENDANTS' AFFIDAVIT OF THOMAS WASSELL IN OPPOSITION TO THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed August 14, 1972)

STATE OF GEORGIA)
) ss
COUNTY OF FULTON)

THOMAS WASSELL, being first duly sworn, deposes and says that the following statements were made upon deponent's own personal knowledge and in response to the Motion for Summary Judgment by plaintiff Martin Cohn:

1.

I am employed by Cox Broadcasting Corporation as a news staff reporter for WSB-TV and I have been so employed for approximately nine years. Prior to my employment with WSB-TV I was employed as a news staff reporter with WNEP-TV, Scranton, Pennsylvania. I am a graduate of Kings College, Wilkes-Barre, Pennsylvania, having received a BA degree in Education in 1951. In my capacity as a news staff reporter with WSB-TV I investigate newsworthy events and prepare and make reports thereon which are televised over WSB-TV.

2.

I was the news staff reporter for WSB-TV that covered the trial on April 10, 1972 of the six youths indicted by the Fulton County Grand Jury for the murder and rape of Cynthia Cohn. I did not receive the assignment to cover the said trial until the morning of April 10,

1972, and I immediately departed for the Fulton County Courthouse after receiving the said assignment. Prior to this assignment, I had not covered any judicial proceedings or any events pertaining to the murder and rape of the said Cynthia Cohn or to the indictment of the six youths accused thereof, and I had never met, nor was I then or now acquainted with, the parents of the deceased girl. As mentioned hereinbefore, I attended the trial of the six youths at the Fulton County Courthouse on April 10, 1972 and I was present during the entire trial of this action on that date, except for approximately the first thirty (30) minutes thereof which I missed due to my late arrival. The news report which I prepared as a result of this assignment related exclusively to the events that took place during the said trial and to the subsequent transfer of the four of the six defendants from the Courthouse to the Fulton County Jail. That such was the substance of the said report which I prepared is shown by a copy of the transcript of said news report, attached hereto as Exhibit A, and a video tape copy of the said news report presently in the custody of the Court.

3.

The information on which I prepared the said report was obtained from several sources. First, by personally attending and taking notes of the said trial and the subsequent transfer of four of the six defendants to the Fulton County Jail, I obtained personal knowledge of the events that transpired during the trial of this action and the said transfer of the defendants. Such personal observations and notes were the primary and almost exclusive source of the information upon which the said news report was based. Secondly, during a recess of the said trial, I approached the clerk of the court, who was sitting directly in front of the bench, and requested to see a copy

of the indictments. In open court, I was handed the indictments, both the murder and the rape indictments, and was allowed to examine fully this document. As is shown by the said indictments (attached hereto as Exhibit B) the name of the said Cynthia Cohn appears in clear type. Moreover, no attempt was made by the clerk or anyone else to withhold the name and identity of the victim from me or from anyone else and the said indictments apparently were available for public inspection upon request.

4.

In preparing the said news report my sole purpose and object was to give a clear and factual report of the said trial and to attempt to capture the tone of the trial. In so reporting on this trial and in preparing the said news reports thereof, I was fully aware of the policy of WSB-TV not to report the name of a victim of a rape or an attempted rape, a policy of WSB-TV on which all reporters are given explicit instructions. In preparation of the said news report, however, I did not consider that the said WSB-TV policy was applicable in that the six defendants had been indicted for both murder and rape and the victim thereof was since deceased, having died approximately eight (8) months prior to the trial. I viewed the said trial, in light of these facts, primarily as a murder case, with additional charges of rape and attempted rape. In my opinion at that time this trial and the incidents related thereto fell within the same category as the much-publicized "Abduction-Murder-Rape" cases, in which a young girl is abducted, subsequently found murdered and raped, and thereafter a trial on grounds of murder and rape. A further factor which undoubtedly affected my decision to include the name of the said Cynthia Cohn in the said news report was the fact that I was given the name of the deceased girl in open court without any

attempt by anyone to withhold the same and the indictments, wherein the said girl's name appeared, were on public display and available to anyone who requested to examine the same. Under no circumstances could it be said, in my opinion, that the name of the said Cynthia Cohn was used in order to sensationalize the trial or to injure or embarrass the family of the deceased girl. Instead, as heretofore related, my sole purpose in preparing and causing to be televised the said report was to give a fair, honest and factual report of the said trial so that the public would have an accurate and complete picture of this said judicial proceeding.

/s/ Thomas Wassell

Sworn to and subscribed before me this 7th day of August, 1972.

/s/ Cynthia S. Willem
Notary Public

My Commission Expires March 2, 1974.

Exhibit A

WSB-TV News

Writer Wassell

Date April 10, 1972

Video	Audio
	Six youths went on trial today for the murder-rape of a teenaged girl.
Film: Wassell Standup	The six Sandy Springs High School boys were charged with murder and rape in the death of seventeen year old Cynthia Cohn following a drinking party last August 18th.

The tragic death of the high school girl shocked the entire Sandy Springs community. Today the six boys had their day in court.

Card #1

There was no jury. The six boys, through their lawyers, threw themselves on the mercy of the court . . . and the presiding judge, Sam Phillips McKenzie.

The prosecutor, Assistant Attorney General John Nuckolls said the girl had apparently drank a considerable amount of vodka after attending a private party. He said the girl was taken to a wooded area and raped. She passed out . . . and the liquids in her stomach were forced upward causing suffocation. The exact cause of death . . . that is whether the rape caused death he said would be difficult to prove.

Card #2

Judge McKenzie dropped the murder charge against all six . . . and proceeded with the charge of rape. The DA told the judge all six defendants wished to plead guilty . . . and not have a jury trial. The DA told the court the girl's family felt that a lenient 5 year sentence would serve justice and he recommended a five year sentence.

Card #3

Eighteen year old Peter Manchee pleaded guilty. The sentence for Manchee 7 years . . . with 4 to serve . . . 3 years under supervision. His defense lawyer pointed out that it was because of Manchee's cooperation the authorities were able to get to the truth of the case.

Card #4

Craig Wosniak . . . the Judge: How do you wish to plead? The boy, guilty . . . Wosniak was also sentenced to 7 years . . . with 4 years to serve.

Card #5

Bruce Howard. The DA said it was Howard who sent another boy to call the police. While he tried to revive the victim. Howard also pleaded guilty to the rape charge and also got 7 years . . . with 4 years to serve.

Card #6

Joe Adam Thompson. His attorney Charles Weltner said Thompson would plead guilty to attempted rape. The Judge sentenced Thompson to 2 years with three months to serve. Weltner did not believe Thompson should have received a jail term because he did not actually commit rape and cooperated with the authorities. Thompson then changed his plea from guilty . . . and asked for a trial by Jury.

Card #2

Judge McKenzie said he knows the parents of the Thompson boy and would be glad to disqualify himself from the jury trial. Then upon a request by Weltner, Judge McKenzie said he would.

Card #7

Ronald Eugene Longo pleaded guilty to attempted rape and was sentenced to 2 years with 3 months to serve.

Card #7

Bobby Ray King. Guilty to attempted rape was given two years probation.

Film: Silent

The four who received jail terms today, Peter Manchee, Craig Wozniak, Bruce Howard and Ronald Longo were taken to the Fulton County Jail. The Judge said he would try to see they served their time close to their home. Those who received 4 years could get out in ten months equal to one third the time off. Thompson will stand trial tomorrow.

Film: Wassell

And so there will be a trial by jury after all. Something of a disappointment for those involved in this tragedy who thought they would be spared some of the embarrassing details.

This is Tom Wassell from the Fulton County Courthouse.

Exhibit B

STATE OF GEORGIA, COUNTY OF FULTON.
IN THE SUPERIOR COURT OF SAID COUNTY.

THE GRAND JURORS selected, chosen and sworn for the County of Fulton, to-wit:

1. JOHN G. PRYOR, SR., FOREMAN
2. CHARLES B. WEST, ASSISTANT FOREMAN
3. MRS. BOISFEUILLET JONES, SECRETARY
4. J. PAUL ANTHONY, JR., ASST. SECRETARY
5. FRANCES ARONSON
6. FRANK J. ARRINGTON
7. MRS. LORRAINE M. BENNETT
8. HUGH W. BRANNON

9. JOHN W. DAVIS
10. FRANK E. EDWARDS
11. MRS. PATRICIA WYNN ELLINGER
12. RUTHERFORD L. ELLIS, JR.
13. JESSE S. HALL
14. MISS FRANCES NELSON
15. RICHARD U. NEWFIELD
16. MRS. LUCIA PULGRAM
17. EDWARD P. SHEALY
18. IAN F. STALKER
19. RAY VAUGHTERS
20. VERNOR R. VINES
21. WILEY W. VIRDEN
22. JAMES E. WELLDEN, JR.
23. H. C. WOOLLEY, JR.

in the name and behalf of the citizens of Georgia, charge and accuse PETER MANCHEE and CRAIG WOZNIAK and BRUCE F. HOWARD and JOE ADAM THOMPSON and RONALD EUGENE LONGO and BOBBY RAY KING with the offense of:—

RAPE

for that said accused, in the County of Fulton and State of Georgia, on the 18th day of August, 1971 did have carnal knowledge of the person of Cynthia Leslie Cohn, a female, forcibly and against her will;—

contrary to the laws of said State, the good order, peace and dignity thereof.

Lewis R. Slaton, District Attorney
Special Presentment.

STATE OF GEORGIA, COUNTY OF FULTON.
IN THE SUPERIOR COURT OF SAID COUNTY.

THE GRAND JURORS selected, chosen and sworn for the County of Fulton, to-wit:

1. JOHN G. PRYOR, SR., FOREMAN
2. CHARLES B. WEST, ASSISTANT FOREMAN
3. MRS. BOISFEUILLET JONES, SECRETARY
4. J. PAUL ANTHONY, JR., ASST. SECRETARY
5. FRANCES ARONSON
6. FRANK J. ARRINGTON
7. MRS. LORRAINE M. BENNETT
8. HUGH W. BRANNON
9. JOHN W. DAVIS
10. FRANK E. EDWARDS
11. MRS. PATRICIA WYNN ELLINGER
12. RUTHERFORD L. ELLIS, JR.
13. JESSE S. HALL
14. MISS FRANCES NELSON
15. RICHARD U. NEWFIELD
16. MRS. LUCIA PULGRAM
17. EDWARD P. SHEALY

18. IAN F. STALKER
19. RAY VAUGHTERS
20. VERNOR R. VINES
21. WILEY W. VIRDEN
22. JAMES E. WELLDEN, JR.
23. H. C. WOOLLEY, JR.

in the name and behalf of the citizens of Georgia, charge and accuse PETER MANCHEE and CRAIG WOZNIAK and BRUCE F. HOWARD and JOE ADAM THOMPSON and RONALD EUGENE LONGO and BOBBY RAY KING with the offense of:—

MURDER

for that said accused, in the County of Fulton and State of Georgia, on the 18th day of August, 1971 did while in the commission of the offense of Rape, a felony, upon the person of Cynthia Leslie Cohn, a female human being, cause her death by causing her to suffocate;—

MURDER & RAPE—$20,000—3-25-72—
Kenneth D. Manchee & Shirley M. Manchee
6631 Hunting Creek Rd NW 30328

(Reference to Certificate of Service Has Been Omitted)

(Caption Omitted)

MOTION OF DEFENDANTS COX BROADCASTING CORPORATION AND THOMAS WASSELL FOR SUMMARY JUDGMENT

(Filed August 14, 1972)

COME NOW defendants Cox Broadcasting Corporation and Thomas Wassell and move this Court, pursuant to §56 of the Civil Practice Act, Ga. Code Ann. §81A-156, for summary judgment in their favor dismissing plaintiff's Complaint with prejudice.

As grounds for this Motion, defendants state that the pleadings and affidavits on file show that there is no genuine issue as to any material fact that might avoid the entry of summary judgment in favor of these defendants and that these defendants are entitled to a judgment as a matter of law.

In support of this Motion, defendants rely upon the following documents which have been filed in these proceedings and incorporated by reference herein:

1. The pleadings, including plaintiff's Complaint and defendants' Answer thereto;

2. Defendants' Affidavit of Thomas Wassell in Opposition to the Plaintiff's Motion for Summary Judgment and Exhibits "A" and "B" attached thereto;

3. Brief of Defendants Cox Broadcasting Corporation and Thomas Wassell in Support of Their Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment.

WHEREFORE, defendants request that their Motion for Summary Judgment be granted; that a judgment be

entered in favor of these defendants and against plaintiff, Martin Cohn, dismissing plaintiff's Complaint with prejudice; and that defendants have such other and further relief as this Court deems just and proper.

King & Spalding
/s/ Kirk McAlpin
/s/ John A. Pickens
/s/ Michael C. Russ
Attorneys for Defendants Cox Broadcasting Corporation and Thomas Wassell

2500 Trust Company of Georgia Building
Atlanta, Georgia 30303
404-577-5350

(Certificate of Service Omitted)

(Caption Omitted)

MOTION OF DEFENDANTS COX BROADCASTING CORPORATION AND THOMAS WASSELL TO STRIKE AFFIDAVIT OF JOHN NUCKOLLS

(Filed August 14, 1972)

COME NOW defendants, Cox Broadcasting Corporation and Thomas Wassell, pursuant to Section 12(f) and Section 56(e) of the Civil Practice Act, Ga. Code. Ann §§81A-112(f), 156(e), and move this Court for an Order striking the Affidavit of John Nuckolls filed in support of plaintiff's Motion for Summary Judgment.

As grounds for this Motion, defendants state that said Affidavit contains immaterial matter that is not admissible in evidence. Furthermore, much of said Affidavit is comprised of inadmissible hearsay, double hearsay and unsup-

ported opinions and conclusions of the Affiant which lack proper foundation. For these and other reasons set forth in defendant's Brief filed in support of this Motion, defendants respectfully submit the Affidavit of John Nuckolls does not meet the requirements of Ga. Code Ann. §81A-156(e), and accordingly said Affidavit is not legally cognizable support for plaintiff's Motion for Summary Judgment.

WHEREFORE, defendants request that the Affidavit of John Nuckolls be stricken in its entirety, or in the alternative, that the irrelevant and inadmissible portions of said Affidavit be stricken and excised from the record.

King & Spalding
/s/ Kirk McAlpin
/s/ John A. Pickens
/s/ Michael C. Russ
Attorneys for Defendants Cox Broadcasting Corporation and Thomas Wassell

2500 Trust Company of
Georgia Building
Atlanta, Georgia 30303
404-577-5350
Date: August 14, 1972

(Certificate of Service Omitted)

(Caption Omitted)

RESPONSE OF DEFENDANTS COX BROADCASTING CORPORATION AND THOMAS WASSELL TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed August 14, 1972)

COME NOW defendants COX BROADCASTING CORPORATION and THOMAS WASSELL pursuant to Ga. Code Ann. §81A-156 (Ga. Laws 1966, pp. 609, 660; 1967, pp. 226, 238), and oppose the Motion for Summary Judgment filed by plaintiff Martin Cohn. In support of this opposition defendants have filed the affidavit of Thomas Wassell dated August 7, 1972 and attached Exhibits, together with the Brief of Defendants Cox Broadcasting Corporation and Thomas Wassell In Support of Their Motion for Summary Judgment And In Opposition to Plaintiff's Motion for Summary Judgment. These documents are incorporated by reference herein.

WHEREFORE, the defendants COX BROADCASTING CORPORATION and THOMAS WASSELL, respectfully pray that the Motion for Summary Judgment by the plaintiff Martin Cohn be denied.

King & Spalding
/s/ Kirk McAlpin
/s/ John A. Pickens
/s/ Michael C. Russ
Attorneys for Defendants Cox Broadcasting Corporation and Thomas Wassell

2500 Trust Company
of Georgia Bldg.
Atlanta, Ga. 30303
404-577-5350

(Certificate of Service Omitted)

(Caption Omitted)

PLAINTIFF'S AFFIDAVIT OF MARTIN COHN IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

(Filed September 29, 1972)

STATE OF GEORGIA)
) ss
COUNTY OF FULTON)

MARTIN COHN, being first duly sworn, deposes and says that the following statements were made upon deponent's own personal knowledge and in support of his Motion for Summary Judgment.

1.

My name is MARTIN COHN and I live at 265 River North Drive, Atlanta, Fulton County, Georgia. I am the father of Cynthia Leslie Cohn, 17 who died on August 18, 1971.

2.

On the 23rd of February, 1972, I was informed that an investigation was underway concerning the death of my daughter. On March 4, 1972, I learned that the Fulton County Grand Jury had indicted six men for the rape and murder of Cindy. The facts and circumstances of the investigation and resulting charges were the subject of the most intense publicity by newspapers, radio, and television. The lurid accounts and details of the case were publicized for what seemed an eternity. Among those telecasting these accounts and details was WSB-TV. Included in this news coverage were allegations and suggestions of misconduct on Cindy's part and statements that there had been a family quarrel the night of her death. These reports were unfounded and untrue.

3.

As a result of this publicity, my wife, my children, and I were subjected to the most excruciating anguish and suffering imaginable. It became necessary for me to remove my two older children from the public schools as they were subjected to harrassment. I also was forced to send my family away from town. I was nearly unable to continue my business activities.

4.

During the first part of March, I was contacted by Mr. John Nuckolls, Assistant District Attorney who was in charge of the case. I stated to him the unbelievable difficulty which the publicity over the case was causing, and pleaded for him to try to stop any further news coverage of the details of the death of my daughter. I told him that if this type of publicity about the case continued unchecked my family and I would be driven crazy. From day to day, under this tremendous pressure I struggled to endure the character attacks on my daughter that constantly occurred and intensified.

5.

Bearing in mind all the previous agony I had faced, it is impossible to exaggerate the utter despair, humiliation and embarrassment I felt when I viewed on WSB-TV a newscast which named my daughter, Cindy, as being the victim of a crime about which so much already had been said. I viewed this telecast at my home on April 10, 1972, at approximately 6:10 P.M. To the best of my knowledge and recollection the newscaster, TOM WASSELL of WSB-TV, stated that Cindy Cohn, a North Springs High School student, was the victim of the rapes and attempted rapes.

6.

I immediately telephoned Assistant District Attorney John Nuckolls, to determine what action could be taken. I do not recall exactly what I said due to my emotional state caused by the telecast. I do know I begged and pleaded with Mr. Nuckolls to do whatever he could to stop the television station from continuing to use her name.

7.

I cannot adequately express my feelings resulting from this telecast. I had managed to somehow survive the previous publicity, terrible as it was, because at least the specific identity of my family and daughter had been avoided. Then anonymity was shattered and everything that went before seemed minor by comparison. I even received sadistic telephone calls when the callers would breathe into the telephone or laugh without saying anything. This had not happened before the telecasts. I felt humiliated by the whole pattern of the publicity because the news media, including the defendants, made it seem as though my daughter was somehow responsible for her rape and death.

8.

I make this Affidavit for the purpose of assisting in the Motion submitted on my behalf for Summary Judgment and in the hope that justice will be done for my daughter, my family and myself.

/s/ Martin Cohn

Sworn to and subscribed before me this 29th day of September, 1972.

/s/ Phyllis Rieke
Notary Public
My Commission Expires Sept. 7, 1974

(Certificate of Service Omitted)

(Caption Omitted)

PLAINTIFFS' AMENDED AFFIDAVIT OF JOHN NUCKOLLS IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed October 2, 1972)

STATE OF GEORGIA)
) ss
COUNTY OF FULTON)

JOHN NUCKOLLS, being first duly sworn, deposes and says that the following statements were made upon deponent's own personal knowledge and in support of Plaintiff's Motion for Summary Judgment.

1.

My name is JOHN NUCKOLLS. I live at 6429 Cherrytree Lane, Atlanta, Georgia. For four and one-half years from January 1968 through June 1972, I was employed as an Assistant District Attorney, Atlanta Judicial Circuit.

2.

During February 1972, I became familiar with an investigation involving six Sandy Springs youths. This investigation culminated on March 3, 1972 with indictments being returned charging the six with the rape and murder of Cynthia Leslie Cohn, a 17 year old female.

3.

On March 4, the day following the return of the indictments widespread coverage was given the case in newspapers and on T.V. This coverage continued daily for almost two weeks, and included statements that the victim had gotten drunk at a party and passed-out after a fight

with her father. Due to the facts which were being related by the press concerning the victim and the conduct of the defendants, Superior Court Judge, Osgood Williams issued an Order restraining counsel for the State and the defense from making any statement to the press; however, news coverage of the case continued unabated.

4.

Approximately March 10, 1972, Affiant met with Martin Cohn, father of Cindy Cohn. At this meeting Affiant was aware that Mr. Cohn was very concerned over the publicity given the case and affiant told him that the District Attorney's office would do all that was possible to protect him from further publicity.

5.

On April 10, 1972, the criminal cases against the six defendants were called for trial before Judge Sam Phillips McKenzie. Affiant's personal investigation into the facts of the case indicated that the felony murder charges were not capable of proof beyond a reasonable doubt, therefore affiant, in open Court, moved to nol pros that indictment as to all defendants. Judge McKenzie inquired of affiant concerning the Motion and affiant stated that the medical testimony upon which the State relied was not legally conclusive that the death of the victim was caused during the commission of the rapes. Based upon affiant's statement of fact, Judge McKenzie nol prossed the murder indictment before proceeding on the arraignment of the defendants to charges of rape.

6.

The Defendants were then arraigned in the rape indictment and three (3) plead guilty to rape, two (2) to attempted rape, and one (1), Joe Thompson, plead not guilty. The Court then asked to hear the facts of the case which formed the basis for the pleas. Affiant stated in open Court the facts as known to affiant, including a statement that the victim's father had suffered severely because of the publicity given the case. The Court accepted the pleas, imposed sentence, and set the Thompson case down for trial at a later date. Present during the above proceeding was Tom Wassell. That evening, April 10, 1972, at approximately 6:10 P.M. affiant observed a telecast over WSB-TV which featured an account by Tom Wassell of the case. Wassell was shown on the Fulton County Courthouse steps. In this telecast Thomas Wassell used the victim's name, Cindy Cohn stating that she was the victim of the rapes and attempted rapes. Affiant followed closely news coverage of the case and to affiant's knowledge this was the first occasion that the name Cindy Cohn had ever been mentioned in any news story. Within minutes of the telecast of Cindy Cohn's name affiant received a telephone call from Martin Cohn. Mr. Cohn insisted that the news program featuring his daughter's name be stopped. Affiant was familiar with the policy of WSB-TV not to use the names of such persons due to prior contacts with WSB-TV personnel, and assured Mr. Cohn that the use of his daughter's name was probably an oversight and would be corrected. After a lengthy conversation with Mr. Cohn, affiant awaited the eleven o'clock news, which was delayed due to a special program.

7.

At approximately 12:20 A.M. April 11, 1972, affiant observed the same telecast as previously mentioned repeated on the late evening news. Again the name Cindy Cohn was used as the victim of a rape and attempted

rape. On April 11, 1972, at approximately 9:15 A. M., affiant observed Thomas Wassell in the chambers of Judge McKenzie. Because of affiant's telephone conversation with Martin Cohn on the previous evening, and Mr. Cohn's comments, affiant inquired of Mr. Wassell if he had intentionally used Cindy Cohn's name during his news coverage of the case. Wassell stated that he had done so intentionally. Affiant asked whether or not he was aware that such telecasts violated Georgia Law and Mr. Wassell stated that he used the victim's name because he thought the name had "already been released". Affiant informed Mr. Wassell that such was not the case and that affiant was greatly concerned over the emotional condition of Mr. Cohn due to the telecast. Affiant requested that such telecasts be halted and after further brief conversation Mr. Wassell departed with the comment that he was going to see his lawyer.

8.

Affiant had the opportunity to personally see and observe Martin Cohn on numerous occasions, both before and after the telecasts on April 10, and April 11, 1972 by WSB-TV. Because of affiant's observations of Martin Cohn following those telecasts which included his daughter's name, affiant concluded that Mr. Cohn could not be asked to be a witness although his testimony was critical to the prosecution. Mr. Cohn's emotional state was such that affiant was unsure of his reaction to the anticipated defense concerning misconduct on the part of his daughter. In addition affiant feared that further publicity which must include Mr. Cohn's name or that of his daughter would cause irreparable damage to him and to his family. For those reasons and others affiant sought a disposition of the remaining case other than by trial. Judge McKenzie heard facts which included facts about Martin Cohn's emotional condition and state of mind and accepted a plea of guilty to attempted rape.

/s/ John Nuckolls

Sworn to and subscribed before me this 2nd day of October, 1972.

/s/ Linda B. Sinclair
Notary Public

(Certificate of Service Omitted)

(Caption Omitted)

AMENDED MOTION FOR SUMMARY JUDGMENT

(Filed October 5, 1972)

Comes now the Plaintiff in the above-styled action and amends its Motion for Summary Judgment by attaching thereto and incorporating therein the Affidavits of Martin Cohn and the amended Affidavit of John Nuckolls, together with a Brief in Support of Plaintiff's Motion, all of which have been duly filed and copies of which have been served on Counsel for Defendants.

This 5 day of October, 1972.

Zachry & Land
By: /s/ Stephen A. Land

1505 Fulton National Bank Bldg.
Atlanta, Georgia 30303
577-6072

(Certificate of Service Omitted)

(Caption Omitted)

MOTION OF DEFENDANTS COX BROADCASTING CORPORATION AND THOMAS WASSELL TO STRIKE THE AFFIDAVIT OF PLAINTIFF MARTIN COHN

(Filed October 24, 1972)

COME NOW defendants Cox Broadcasting Corporation and Thomas Wassell, pursuant to Section 12(f) and Section 56(e) of the Georgia Civil Practice Act, *Ga. Code Ann.* §§ 81A-112(f), 156(e) and move this Court for an order striking the affidavit of plaintiff Martin Cohn.

As grounds for this motion, defendants respectfully show that:

1. The said affidavit contains inadmissible opinions and conclusions of the affiant; is without any probative value in that the affidavit affirmatively shows that it contains conclusory allegations; purports to be predicated upon matters which are inadmissible; and accordingly fails to meet the requirements of *Ga. Code Ann.* § 81A-156(e) and is not legally cognizable;

2. The said affidavit is immaterial, irrelevant and not germane and without probative value in that it constitutes no more than a reiteration of the allegations of the plaintiff's complaint which have been pierced by defendants' affidavits and Motion for Summary Judgement and accordingly offers nothing to refute defendants' proof as aforesaid;

3. Paragraphs 2, 3, 4, 5, 6 and 7 of plaintiff's affidavit contain inadmissible and unsupported conclusions and opinions of the affiant and accordingly, the same having no probative value and not being legally cognizable, fail to meet the requirements of *Ga. Code Ann.* § 81A-156(e).

WHEREFORE defendants move that the said affidavit of plaintiff Martin Cohn be stricken in its entirety for the reasons aforesaid, or in the alternative, that the irrelevant and inadmissible portions thereof be stricken.

King & Spalding
/s/ Kirk M. McAlpin
/s/ John A. Pickens
Attorneys for Defendants Cox Broadcasting Corporation and Thomas Wassell

2500 Trust Company of Georgia Building
Atlanta, Georgia 30303
404/577-5350

(Certificate of Service Omitted)

(Caption Omitted)

MOTION OF DEFENDANTS COX BROADCASTING CORPORATION AND THOMAS WASSELL TO STRIKE AND TO RENEW ITS MOTION TO STRIKE THE ORIGINAL AND THE AMENDED AFFIDAVITS OF JOHN NUCKOLLS

(Filed October 24, 1972)

COME NOW defendants Cox Broadcasting Corporation and Thomas Wassell, pursuant to Section 12(f) and Section 56(e) of the Georgia Civil Practice Act, *Ga. Code Ann.* §§ 81A-112(f), 156(e) and renew their Motion to Strike the original affidavit of John Nuckolls and further move this Court for an order striking the amended affidavit of John Nuckolls.

As grounds for this motion and defendants' Motion to Strike the original affidavit of John Nuckolls, defendants respectfully show that:

1. The said original and amended affidavits contain inadmissible hearsay, opinions and conclusions of the affiant; are without any probative value in that the said affidavits affirmatively show that they contain conclusory allegations; purport to be predicated upon matters which are inadmissible; and accordingly fail to meet the requirements of *Ga. Code Ann.* § 81A-156(e) and are not legally cognizable;

2. The said affidavits are immaterial, irrelevant and not germane and without probative value in that they constitute no more than a reiteration of the allegations of the plaintiff's complaint which has been pierced by defendants' affidavits and Motion for Summary Judgement and accordingly offer nothing to refute defendants' proof as aforesaid;

3. The said affidavits constitute conclusory allegations and inadmissible matter in that they purport to express an opinion as to the state of mind of another person, said statements and opinions being inadmissible and insufficient to constitute evidence pursuant to *Ga. Code Ann.* § 81A-156(e), and accordingly the said affidavit is not legally cognizable.

4. Paragraphs 9, 13 and 14 of the original affidavit of John Nuckolls and paragraphs 4, 7, and 8 of the amended affidavit of John Nuckolls contain inadmissible hearsay, conclusions and opinions of the affiant and accordingly, the same having no probative value and not being legally cognizable, fail to meet the requirements of *Ga. Code Ann.* § 81A-156(e).

WHEREFORE defendants move that the said original and amended affidavits of John Nuckolls be stricken in their entirety for the reasons aforesaid, or in the alternative, that the irrelevant and inadmissible portions thereof be stricken.

King & Spalding
/s/ Kirk M. McAlpin
/s/ John A. Pickens
Attorneys for Defendants Cox Broadcasting Corporation and Thomas Wassell

2500 Trust Company of Georgia Building
Atlanta, Georgia 30303
404/577-5350

(Certificate of Service Omitted)

(Caption Omitted)

AMENDMENT TO ANSWER OF DEFENDANTS, COX BROADCASTING CORPORATION AND THOMAS WASSELL

(Filed October 24, 1972)

COMES NOW COX BROADCASTING CORPORATION and THOMAS WASSELL, defendants in the above-styled action, and as permitted by Georgia Code Section 81A-115(a) prior to the entry of a pre-trial order in this cause, amend their answer as follows:

1.

By striking the EIGHTH DEFENSE to the Plaintiff's Complaint in its entirety and inserting in lieu thereof the following:

EIGHTH DEFENSE

Georgia Code Section 26-9901 upon which the Plaintiff bases his suit and which provides as follows:

> "It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor"

is repugnant to and in violation of Article I, Section I, Paragraph XV of the Constitution of the State of Georgia which provides as follows:

> "No law shall ever be passed to curtail or restrain the liberty of speech, or of the press; any person may speak, write and publish his sentiments, on all subjects, being responsible for the abuse of that liberty."

for the reason that said statute is a law which seeks to curtail or restrain the liberty of the press by prohibiting the publication or broadcast of the name or identity of a female who may have been raped and seeks to restrain the publication of the name or identity of a female who may have been raped which is a matter of public interest and concern, which right is guaranteed under Article I, Section I, Paragraph XV of the Constitution of the State

of Georgia and therefore violates defendants' constitutional rights as aforesaid.

2.

By adding to the answer a NINTH DEFENSE to the Plaintiff's Complaint as follows:

NINTH DEFENSE

Georgia Code Section 26-9901 upon which the Plaintiff bases his suit and which provides as follows:

> "It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor."

is, as applied to the alleged circumstances in this action, repugnant to and in violation of the First Amendment to The United States Constitution, which provides in part, as follows:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press: . . ."

and the Fourteenth Amendment to The United States Constitution, which provides in part, as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

for the reason that said statute constitutes a prior restraint upon the publication of matters of public interest and concern; that the said statute prohibits the publication of truthful facts about matters of public interest and concern; and is unduly overbroad in its prohibition of the publication of the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made without regard to the other facts and circumstances surrounding the rape or attempted rape which may make the female victim's name or identity a matter of public interest or concern, the same being violative of defendants' constitutional rights, as aforesaid.

3.

By adding to the answer a **TENTH DEFENSE** to the Plaintiff's Complaint as follows:

TENTH DEFENSE

Georgia Code Section 26-9901 upon which the Plaintiff bases his suit and which provides as follows:

> "It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this

> State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor."

is repugnant to and in violation of the First Amendment to The United States Constitution, which provides in part as follows:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

and the Fourteenth Amendment to The United States Constitution, which provides in part as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

for the reason that the said statute seeks to impose criminal sanctions upon acts of individuals in truthfully reporting events of public interest and concern, the right to do so being guaranteed to such individuals and these defendants under the First and Fourteenth Amendments to The United States Constitution and to Article I, Section I, Paragraph XV of the Georgia Constitution, all as aforesaid.

4.

By adding to the answer an **ELEVENTH DEFENSE** to the Plaintiff's Complaint as follows:

ELEVENTH DEFENSE

Plaintiff is not in any way entitled to any of the relief sought as against defendants in this cause.

Respectfully submitted this 23 day of October, 1972.

King & Spalding
/s/ Kirk McAlpin
/s/ John A. Pickens
Attorneys for Defendants Cox Broadcasting Corporation and Thomas Wassell

2500 Trust Company of Georgia Building
Atlanta, Georgia 30303
Tel (404) 577-5350

(Certificate of Service Omitted)

ORDER ON MOTIONS FOR SUMMARY JUDGMENT FILED BY SAID PLAINTIFF AND SAID DEFENDANTS

The Order of the Trial Court on Cross-Motions for Summary Judgment may be found in the appendix to the Jurisdictional Statement commencing at page A-1.

(Caption Omitted)

MOTION TO RECONSIDER

(Filed December 22, 1972)

COME NOW Cox Broadcasting Corporation and Thomas Wassell, defendants in the above-styled action, and file and make this their Motion for Reconsideration of this Court's Order dated December 12, 1972, granting plaintiff's Motion for Summary Judgment, only as to liability, and denying defendants' Motion for Summary Judgment.

As grounds for their Motion for Reconsideration these defendants show the following:

1.

It is respectfully submitted that this Court has overlooked or has erroneously misconstrued the controlling and applicable law in this action in finding that:

(a) *Ga. Code Ann.* §26-9901, and its predecessor *Ga. Laws* 1911, pp. 179-180, state a rule of civil conduct upon which plaintiff, the father of the deceased victim Cynthia Leslie Cohn, can recover from these defendants under the particular facts in the instant case;

(b) *Ga. Code Ann.* §26-9901 operates in favor not only of the female victim but also in favor of her family, especially the victim's father, and that a violation as to the female victim is also a violation as to the father of the said female victim;

(c) *Ga. Code Ann.* §26-9901 is applicable to the publication of the name or identity of a female victim who is deceased on the date of the publication in question;

(d) The constitutional and statutory privileges afforded the news media are modified to the extend of the conduct proscribed by *Ga. Code Ann.* §26-9901;

(e) *Ga. Code Ann.* §26-9901, and its predecessor *Ga. Laws* 1911, pp. 179-180, is not unconstitutional as a rule of civil conduct for any reason set forth in the pleadings in this action.

2.

It is respectfully submitted that *Ga. Laws* 1911, pp. 179-180, upon which this Court has predicated its finding of liability on the part of these defendants, was repealed by the enactment of the 1968 Criminal Code, *Ga. Laws* 1968, p. 1249, 1338.

WHEREFORE, defendants Cox Broadcasting Corporation and Thomas Wassell respectfully pray that this Court reconsider and set aside its Order of December 12, 1972, and grant defendants' Motion for Summary Judgement and deny plaintiff's Motion for Summary Judgement.

King & Spalding
/s/ Kirk M. McAlpin
/s/ John A. Pickens
/s/ Joseph R. Bankoff
Attorneys for Defendants Cox Broadcasting Corporation and Thomas Wassell

2500 Trust Company of
Georgia Building
Atlanta, Georgia 30303
(404) 658-1350

(Certificate of Service Omitted)

(Caption Omitted)

ORDER UPON HEARING OF DEFENDANTS' MOTION TO RECONSIDER

(Filed December 29, 1972)

Upon consideration of said motion on the briefs of counsel, and the oral arguments of counsel, the Court has undertaken to review its previous order and to consider all points made in the motion; and is constrained to adhere to its previous order and ruling and it is so ordered by the Court.

Upon presentation of a certificate of immediate review, if such is desired, immediate review will be ordered.

This 29 December, 1972.

Durwood Pye, Judge
Superior Court

(Caption Omitted)

CERTIFICATE OF APPEALABILITY OF ORDER UPON HEARING OF DEFENDANTS' MOTION TO RECONSIDER

(Filed December 29, 1972)

Motion for Reconsideration having been made by defendants in the above styled action, and an Order adhering to the Court's previous order of December 12, 1972, having been entered by the Court on the 29th day of December, 1972, now and within 10 days of the denial of said Order of December 29, 1972, I hereby certify that said Order of December 29, 1972, is of such importance to the case

that immediate review should be had, and that direct appeal in such matter is proper.

This 29th day of December, 1972.

/s/ Durwood Pye
Judge
Superior Court of Fulton County

(Caption Omitted)

NOTICE OF APPEAL

(Filed January 9, 1973)

Notice is hereby given that the defendants above named hereby appeal to the Supreme Court of the State of Georigia from an Order of the Honorable Durwood T. Pye, Judge of the Superior Court, Fulton County, State of Georgia, granting Summary Judgment for the plaintiff, only as to liability, signed on the 12th day of December, 1972, and entered in the Clerk's Office on the 13th day of December, 1972. The defendants appeal from each and every part of said Order.

Notice is also hereby given that the above named defendants hereby appeal to the Supreme Court of the State of Georgia from an Order of the Honorable Durwood T. Pye, Judge of the Superior Court, Fulton County, State of Georgia, signed on the 12th day of December, 1972, and entered in the Clerk's Office on the 13th day of December, 1972, denying defendants' Motion for Summary Judgment in the above styled action, which Order was certified on the 19th day of December, 1972, by said Honorable Durwood T. Pye to be of such importance to the case that immediate review should be had herein and the defendants appeal from each and every part of said Order.

Notice is also hereby given that defendants above named hereby appeal to the Supreme Court of the State of Georgia from an Order of the Honorable Durwood T. Pye, Judge of the Superior Court, Fulton County, State of Georgia, signed on the 29th day of December, 1972, and entered on the 29th day of December, 1972, which Order reaffirmed and adhered to the Order of the Court in the above styled cause signed on December 12, 1972, and entered on December 13, 1972, which Order granted Summary Judgment in behalf of the plaintiff, only as to liability. The defendants appeal from each and every part of said Order.

Notice is also hereby given that the above named defendants hereby appeal to the Supreme Court of the State of Georgia from an Order of the Honorable Durwood T. Pye, Judge of the Superior Court, Fulton County, State of Georiga signed on the 29th day of December 1972, and entered on the 29th day of December, 1972, which Order reaffirmed and adhered to the Order of the Court in the above styled case signed on December 12, 1972, and entered on the 13th day of December, 1972, denying defendants' Motion for Summary Judgment in the above styled case, which Order was certified on the 29th day of December, 1972, by said Honorable Durwood T. Pye to be of such importance to the case that immediate review should be had herein and the defendants appeal from each and every part of said Order.

The clerk will please omit nothing pertaining to this action from the record on appeal.

No transcript of evidence and proceedings will be filed for inclusion in the record on appeal.

This 9th day of January, 1973.

King & Spalding
/s/ Kirk M. McAlpin
/s/ John A. Pickens
/s/ Joseph R. Bankoff
Attorneys for Defendants Cox Broadcasting Corporation and Thomas Wassell

2500 Trust Company of Georgia Building
Atlanta, Georgia 30303
(404) 658-1350

(Certificate of Service Omitted)

IN THE SUPREME COURT OF GEORGIA

CASE NO. 27880

COX BROADCASTING CORPORATION AND THOMAS WASSELL,
Appellants

vs.

MARTIN COHN,
Appellee

ENUMERATION OF ERRORS BY APPELLANTS

• • •

4.

The Superior Court of Fulton County erred as a matter of law in granting appellee Martin Cohn's Motion for Summary Judgment because the pleadings, together with appellants' Motion for Summary Judgment and affidavits attached thereto show that it was error as a matter of law for the court to find that the privileges afforded defendants by the First and Fourteenth Amendments to the United States Constitution, Article I, Section I, Paragraph XV of the Constitution of the State of Georgia, (*Georgia Code* § 2-115) and *Georgia Code* §§ 105-704, 709(4) must yield to the restriction of speech and press embodied in that part of the Act of the General Assembly of Georgia, approved April 10, 1968, *Ga. Laws* 1968, pp. 1249-1351, designated therein at pp. 1335-36 as Section 26-9901 relating to the Publication of Name or Identity of Female Raped or Assaulted: Punishment [codified as Georgia Code § 26-9901] and the Act of the General Assembly of Georgia, approved August 21, 1911 relating to the Name of Assaulted Female, Publication of Prohibited, *Ga. Laws* 1911, pp. 179-80 [codified as Georgia Code (1933) § 26-2105], and that the said privileges are modified to the extent of the said restriction in said statutes. (R. 6-9, 307-08].

• • •

6.

The Superior Court of Fulton County erred as a matter of law in granting appellee Martin Cohn's Motion for Summary Judgment because the pleadings, together with appellants' Motion for Summary Judgment and affidavits attached thereto show that it was error as a matter of law for the Court to find that the part of the Act of the General Assembly of Georgia, approved April 10, 1968, *Ga. Laws* 1968, pp. 1249-1351, designated therein at pp. 1335-36 as Section 26-9901 relating to the Publication of Name or Identity of Female Raped or Assaulted: Punishment [codified as Georgia Code § 26-9901] and the Act of the General Assembly of Georgia, approved August 21, 1911 relating to the Name of Assaulted Female, Publi-

cation of Prohibited, *Ga. Laws* 1911, pp. 179-80 [codified as Georgia Code (1933) § 26-2105], are not unconstitutional as a rule of civil conduct for any reason set forth in the pleadings, the said statutes being not unreasonably restrictive of the freedom of speech and press. (R. 251-59, 305-08).

• • •

10.

The Superior Court of Fulton County erred as a matter of law in denying appellants Cox Broadcasting Corporation and Thomas Wassell's Motion for Summary Judgment because the pleadings, together with appellants' Motion for Summary Judgment and affidavits attached thereto show that there is no genuine issue as to any material fact and that appellants are entitled to a judgment in their favor as a matter of law for the reason that appellants' actions in publishing the name of appellee's deceased daughter, Cynthia Leslie Cohn, are privileged under the First and Fourteenth Amendments to the United States Constitution, Article I, Section I, Paragraph XV of the Constitution of the State of Georgia, (*Georgia Code* § 2-115) and *Georgia Code* §§ 105-704, 709(4) which afford the privilege to the news media to make truthful reports relating to matters of public or general concern and to court proceedings and reports emanating from police investigations. (R. 8-9).

• • •

12.

The Superior Court of Fulton County erred as a matter of law in denying appellants Cox Broadcasting Corporation and Thomas Wassell's Motion for Summary Judgment because the pleadings, together with appellants' Motion for Summary Judgment and affidavits attached thereto show that there is no genuine issue as to any material

fact and that appellants are entitled to a judgment in their favor as a matter of law for the reason that the part of the Act of the General Assembly of Georgia, approved April 10, 1968, *Ga. Laws* 1968, pp. 1249-1351, designated therein at pp. 1335-36 as Section 26-9901 relating to the Publication of Name or Identity of Female Raped or Assaulted: Punishment [codified as Georgia Code § 26-9901] (and the Act of the General Assembly of Georgia, approved August 21, 1911 relating to the Name of Assaulted Female, Publication of Prohibited, *Ga. Laws* 1911, pp. 179-80 [codified as Georgia Code (1933) § 26-2105] insofar as the same may be deemed applicable) is unconstitutional as restrictive of the freedom of speech and press in violation of the First and Fourteenth Amendments to the United States Constitution and Article I, Section I, Paragraph XV of the Constitution of the State of Georgia (*Georgia Code* § 2-115) in that the said statute constitutes a prior restraint on the freedom of speech and press by prohibiting the reporting of truthful facts of public interest and concern and the said statute is unconstitutionally overbroad on its face and in its application since it prohibits the publication of both true and false statements and also applies to both publications relating to a victim who has only been raped or assaulted with intent to commit rape and to a victim who has been raped or assaulted with intent to commit rape on whom another crime has been perpetrated and who otherwise may be a matter of public interest and concern. (R. 251-59).

• • •

(Certificate of Service Omitted)

OPINION

The opinion of the Supreme Court of Georgia may be found in the appendix to the Jurisdictional Statement at page A-9.

(Caption Omitted)

JUDGMENT OF THE SUPREME COURT OF GEORGIA

Atlanta, September 5, 197[3]

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

Cox Broadcasting Corporation et al. v. Martin Cohn

This case came before this court upon an appeal from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed in part and reversed in part with direction for the reasons stated in the opinion this day filed. All the Justices concur except Grice, P. J., Undercofler and Jordan, JJ., who dissent.

(Caption Omitted)

MOTION FOR REHEARING AND REARGUMENT BY APPELLANTS COX BROADCASTING CORPORATION AND THOMAS WASSELL

(Filed September 14, 1973)

COME NOW Cox Broadcasting Corporation and Thomas Wassell, appellants in the above-styled action, and make and file this their Motion for Rehearing and Reargument of Sections III, IV and V of this Court's decision dated September 5, 1973, which sections are adverse to appellants. Appellants respectfully submit that this Court in said sections of its majority opinion has overlooked or erroneously construed and misapplied the controlling and applicable law and authorities in this Appeal in that:

(1) In Section III the majority erroneously held and stated:

> "This jurisdiction is not without precedent in the 'relational' area of the law. [Citing Bazemore, et al. v. Savannah Hospital, et al., 171 Ga. 257, 20 SE 2d, (1930)] . . . *Bazemore* said that the parents of the deceased infant had a cause of action against the newspaper because of its public disclosure which affected them, the parents. As we read *Bazemore*, how that public disclosure by the newspaper came about, whether by breach of contractual and ethical obligations or otherwise, was immaterial. A newspaper made a public disclosure concerning a deformed, deceased infant of surviving parents. Such disclosure allegedly affected the surviving parents in an adverse manner. The surviving parents' complaint properly stated a cause of action against the newspaper. In the case at bar we hold that the Appellee's complaint properly stated a cause of action, whether it be denominated 'relational' or not, against the Appellants."[1]

However, the majority overlooks and fails to cite controlling and applicable Georgia decisions involving parents' "relational" claims of invasion of privacy which expressly hold that there can be no cause of action for publications of matters of *public interest* or in connection with a *public investigation* relating to the death of a relative of the plaintiff. *Waters* v. *Fleetwood*, 212 Ga. 161 (1956), *Atlanta Journal Company* v. *Farmer*, 48 Ga. App. 273 (1934), *Pavesich* v. *New England Life Insurance Company*, 122 Ga. 190, 204 (1911), *Gouldman-Taber Pontiac, Inc.* v. *Zerbet*, 213 Ga. 682 (1957). The majority opinion's reliance on *Bazemore* v. *Savannah Hospital*, 171 Ga. 257 (1930), is unfounded in that *Bazemore* did not involve a matter

1. Majority Op. pp. 10, 12.

of legitimate or public concern and turned upon a breach of a contractual obligation of confidentiality.[2]

(2) In Section V the majority opinion erroneously disposes of "the head-on collision" between the First Amendment freedom of the press and the appellee's claimed invasion of privacy, holding and stating to wit:

> "There are a number of legitimate limitations on speech which are not proscribed by the First Amendment. These limitations are generally set forth by Professor Leflar in The Free-ness of Free Speech, 15 Vanderbilt L. Rev. 1073 (October, 1962). In that article the author discussed the freedom of speech requirement of the First Amendment, and he determined that this constitutional guarantee is not absolute. He further concluded that the court should weigh the conflicting societal values of the present day in reaching a decision as to whether the particular speech in issue is protected by the First Amendment . . . The Court in *Briscoe* [v. *Reader's Digest Assoc.*, 438 P. 2d 34 (1971)] then went on to say: 'But the rights guaranteed by the First Amendment do not require total abrogation of the right to privacy. The goal sought by each may be achieved with a minimum of intrusion upon the other.' We agree. First Amendment proscriptions do not bar the claim of the Appellee against the Appellants in this case."[3]

However, the majority has overlooked the unbroken line of controlling authority in which the United States Supreme Court, since 1964, has held that the news media is *constitutionally privileged* to publish *truthful accounts of matters of general or public concern,* for

2. See pp. 30-31 of Appellants' Brief.
3. Majority Op. pp. 14, 18.

which no criminal sanctions or civil damages may be imposed. See, e.g., *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 29 L.Ed. 2d 296 (1971); *Time, Inc.* v. *Hill*, 385 U.S. 374, 17 L.Ed. 2d 456 (1967); *New York Times Co.* v. *Sullivan*, 376 U.S. 264, 11 L.Ed. 2d 686 (1964); *Garrison* v. *Louisiana*, 379 U.S. 64, 13 L.Ed. 2d 125 (1964).

(3) In Section IV the majority opinion erroneously creates a new civil cause of action for truthful publications of newsworthy matters, allowing recovery for publications of such matters, when reasonable men would find the said publication . . . highly offensive, the majority holding and stating to wit:

> "And in formulating such an issue for determination by the fact-finder, it is reasonable to require the Appellee to prove that the Appellants invaded his privacy with wilful or negligent disregard for the fact that reasonable men would find the invasion highly offensive."[4]

However, such a holding completely overlooks and is contrary to controlling decisions of this Court and the United States Supreme Court which fully protect the publications of truthful accounts of matters of public interest or public investigation. *Pavesich* v. *New England Life Insurance Company*, 122 Ga. 190 (1911), the dissent having approvingly quoted from *Pavesich*, to wit:

> "The truth may be spoken, written, or printed about all matters of a public nature, as well as matters of a private nature in which the public has a legitimate interest."[5]

4. Majority Op. p. 13.
5. Dissenting Op. p. 2.

Waters v. *Fleetwood*, 212 Ga. 161 (1956); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 29 L.Ed. 2d 296 (1971); *Time, Inc.* v. *Hill*, 385 U.S. 374, 17 L.Ed. 2d 456 (1967); *New York Times Co.* v. *Sullivan*, 376 U.S. 264, 11 L.Ed. 2d 686 (1964); *Garrison* v. *Louisiana*, 379 U.S. 64, 13 L.Ed. 2d 125 (1964).

Wherefore, appellants Cox Broadcasting Corporation and Thomas Wassell respectfully pray that this Court grant a rehearing and reargument as to Sections III, IV and V of its said decision of September 5, 1973, and that upon rehearing this Court remand this case to the lower Court with directions to grant the appellants' Motion for Summary Judgment for the reasons that appellee's complaint fails to state a cause of action, there being no relational right of privacy in Georgia when the publication involves matters of public or general concern or of a public investigation, and for the further reason that appellants' publication was privileged in that it related to a matter of public or general concern.

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ON MOTION FOR REHEARING

The opinion of the Supreme Court of Georgia denying the appellants' Motion for Rehearing may be found in the appendix to the Jurisdictional Statement beginning at page A-24.

[redacted]

IN THE

Supreme Court of the United States

[redacted]

OCTOBER TERM, 1975

No. 75-[redacted]

[redacted]

COX BROADCASTING CORPORATION, and
THOMAS WASSELL,

Appellants,

[redacted]

MARTIN COHN,

Appellee.

[redacted]

ON APPEAL FROM THE
[redacted] COURT OF GEORGIA

[redacted]

MOTION TO DISMISS OR AFFIRM

[redacted]

[redacted]
[redacted]
[redacted]

Attorneys for Appellee.

[redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-938

COX BROADCASTING CORPORATION, and
THOMAS WASSELL,
Appellants,

v.

MARTIN COHN,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF GEORGIA

MOTION TO DISMISS OR AFFIRM

Appellee, in the above-entitled cause, moves this Honorable Court to dismiss the appeal herein on the grounds hereinafter set forth or, in the alternative, to affirm the judgment sought to be reviewed on appeal upon the grounds

that it is manifest that the questions upon which the decision of this cause rest are so unsubstantial as not to need further argument, and/or that the judgment rests on adequate statutory and constitutional principles.

STATEMENT OF THE CASE

Martin Cohn, Appellee herein, on May 8, 1972, filed a civil complaint in the Superior Court of Fulton County alleging that Appellants willfully, unlawfully and negligently invaded his privacy by disseminating the name and identity of his daughter Cynthia, the victim of multiple, brutal rapes, over the facilities of WSB-TV, an Atlanta television station owned and operated by Appellant Cox Broadcasting Corporation.

The rapes took place in August of 1971 and the telecasts referred to herein occurred some eight (8) months later on April 10, 1972, the date on which five of the six perpetrators entered pleas of guilty to rape or attempted rape. Murder charges against all the perpetrators were dismissed by the State on motions of *nolle prosequi*.

As there was no dispute as to any material fact, both parties moved for summary judgments based on affidavits.

On December 13, 1972, the Superior Court of Fulton County entered an order granting Appellee's motion for summary judgment as to liability and denying Appellants' motion for summary judgment.

On December 29, 1972, the Superior Court reaffirmed its decision of December 13, 1972 and certified the order for direct appeal.

On September 5, 1973, the Supreme Court of Georgia affirmed the denial of Appellants' motion for summary judgment, reversing the granting of Appellee's motion for summary judgment, and remanded the case for trial.

On September 19, 1973, Appellants' motion for a rehearing was denied by the Supreme Court of Georgia.

On December 17, 1973, Appellants filed a Jurisdictional Statement in this Court.

ARGUMENT

THE JUDGMENT OF THE SUPREME COURT OF GEORGIA RESTS UPON PROPER AND ADEQUATE STATUTORY AND CONSTITUTIONAL GROUNDS AND/OR NO SUBSTANTIAL QUESTION IS PRESENTED FOR REVIEW BY THIS COURT.

The Supreme Court of Georgia held in the case on appeal herein that the State, through its legislative body, had the constitutional authority to protect the anonymity of victims of rapes or attempted rapes by prohibiting their identification in the news media. The Court further held the statute expressed the legislative determination that the public identification of the victims of rapes or attempted rapes was not a matteer of public interest or general concern, *i.e.*,

newsworthy, and was hence not entitled to *First* or *Fourteenth Amendment* protection.

The statute in question is *Ga. Code Ann.* § *26-9901,* (Ga. Laws 1968, pp. 1335, 1336) and was a reenactment of an earlier statute (Ga. Laws 1911, pp. 179-180) and added references to modern means of communication, such as television and radio. The rationale behind the statute was to overcome the notorious reluctance of rape victims to testify as prosecution witnesses by protecting them and their families from the acute embarassment and humiliation peculiar to the offense of rape by giving such unfortunates a guarantee against mass publicity. *State v. Evjue,* 253 Wis. 146 (1948), 33 N.W.2d 305.

In interpreting this statute, the Supreme Court of Georgia, in deciding the instant case, held that "there simply is no public interest or general concern about the identity of the victim of such a crime as will make the right to disclose the identity of the victim rise to the level of *First Amendment* protection." *Cox Broadcasting Corporation, et al v. Cohn,* 231 Ga. 60, 200 S.E. 2d 127 (1973). The Court noted that the *First Amendment* is not absolute and that there is a necessary balancing by the Courts in protecting the privacy of an individual which is on a par with the interest in disclosure of the identity of such a person. In weighing those interests, the Court held that such disclosure was not protected because it was not a matter of a public interest or general concern. Citing the *Evjue* case, *supra,* the Court approved language stating that " . . . there is a minimum of social value in the publication of the identity of a female in connection with such an outrage. Certain it is that the

legislature could so find. At the most the publication of the identity of the female ministers to a morbid desire to connect the details of one of the most detestable crimes known to the law with the identity of the victim . . . There can be no doubt that the slight restriction of the freedom of the press . . . is fully justified."

It is appropriate to note that Georgia, as other States, maintains the anonymity of juveniles charged with crimes by preventing the press and public from being informed of the identity of such juveniles except by consent or court order. See, *Ga. Code Ann.* §*24A-3502* (Ga. Laws 1971, pp. 709, 751). The societal interest in anonymity, as expressed by legislative enactment, has been deemed to outweigh whatever interest there might be in disclosure. The two situations would seem to be analogous.

In this case, no legitimate public interest or general concern regarding the identity of the victim of a rape has been raised, nor did the Supreme Court of Georgia find any. What Appellants appear to be suggesting is an absolutist interpretation of the *First Amendment* which deprives the Legislature of any power to protect the privacy of certain of its citizens regardless of the social interest in doing so. Their position further seems to infer that what is newsworthy is up to the press to decide and not the judicial and legislative branches of government. This Court has consistently rejected this position, notably in *Miller v. California,* 413 U.S. 15, 23 (1973), wherein it was stated that the *First* and *Fourteenth Amendments* have never been treated as absolutes, citing *Breard v. Alexandria,* 341 U.S. at 642.

Appellee further notes that there is no restriction in the law whatever that prevents the press from fully airing the event itself with all the lurid details, including the judicial disposition of whatever prosecutions there might be. Only the identity of the victim is safeguarded.

Appellee submits that the statute in question protects the privacy and anonymity of a narrowly defined class of females from mass publicity in the press for very strong and cogent reasons. Because their identity is not of any conceivable public concern or interest, the *First Amendment* and the decisions of this Court cited by Appellants, particularly *Time, Inc. v. Hill,* 385 U.S. 374, 17 L. Ed. 2d 456 (1967), and *New York Times Company v. Sullivan,* 376 U.S. 264, 11 L. Ed. 2d 686 (1964), are wholly inapplicable for their holdings presuppose and assume that the matters in question are newsworthy and thus merit constitutional protection. Such is not the posture of this case.

CONCLUSION

Appellee, therefore, respectfully requests this Court, on the basis of arguments set forth herein, to dismiss the appeal from the Supreme Court of Georgia and/or in the alternative, to affirm that Court's judgment.

Respectfully submitted,

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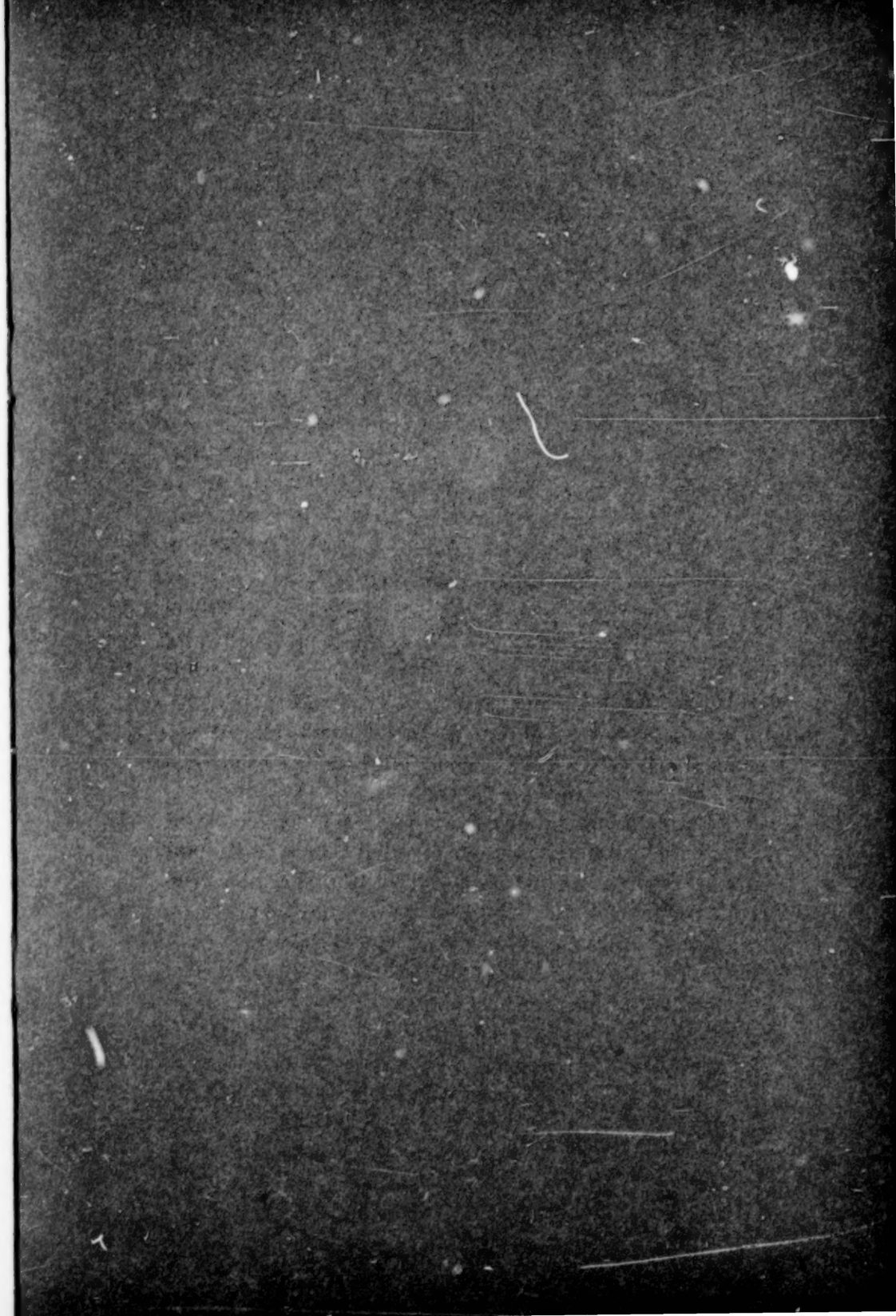

Supreme Court, U. S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM 1973

No. 73-938

COX BROADCASTING CORPORATION AND
THOMAS WASSELL,
Appellants,

vs.

MARTIN COHN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF FOR THE APPELLANTS COX BROADCASTING CORPORATION AND THOMAS WASSELL

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In the Supreme Court of the United States

OCTOBER TERM 1973

No. 73-938

COX BROADCASTING CORPORATION AND THOMAS WASSELL,
Appellants,

vs.

MARTIN COHN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF FOR THE APPELLANTS COX BROADCASTING CORPORATION AND THOMAS WASSELL

OPENING STATEMENT

Appellants Cox Broadcasting Corporation and Thomas Wassell appeal the judgment of the Supreme Court of Georgia which upholds the constitutionality of GA. CODE ANN. § 26-9901, a criminal statute prohibiting the news media's publication of the name of a female victim of rape or attempted rape. In the course of a timely news story concerning the disposition in open court of the criminal charges, the appellants published the name of an alleged victim of a murder-rape as it appeared in the indictments.

The publication occurred in a news story filmed on the courthouse steps and broadcast on the day of the hearing (eight months after the criminal incident and the death of the victim).

The Georgia Court has held that because of GA. CODE ANN. § 26-9901, the First Amendment to the Constitution of the United States fails to protect or to privilege the appellants' publication of a rape victim's name. The Georgia Court has further concluded that the appellants may constitutionally be held liable for civil damages for allegedly invading the right to privacy of the deceased victim's father by their publication of the victim's name.

OPINIONS BELOW

The decision and the opinion on rehearing of the Supreme Court of Georgia are reported at 231 Ga. 60, 200 S.E.2d 127 (1973) and are set forth in Appendix A to the appellants' Jurisdictional Statement, A-9 through A-26. The opinion of the Superior Court of Fulton County in this cause is not reported, but is set forth in Appendix A to the appellants' Jurisdictional Statement, A-1 through A-6.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2), for this appeal draws into question the validity of 1968 GA. LAWS, pp. 1335, 1336 (GA. CODE ANN. § 26-9901) on grounds that it is repugnant to the Constitution of the United States.

Appellants seek to review the judgment of the Supreme Court of Georgia in a civil action for invasion of privacy. The court below ruled that Cox Broadcasting Corporation and its reporter Thomas Wassell may be held liable for civil damages if a jury finds their publication

of the name of a deceased victim of a murder-rape in the course of a truthful news story concerning the public trial of those accused of the crime to be "highly offensive."[1] The news story complained of was broadcast on the day of the trial.

The Georgia Supreme Court expressly held that the Georgia criminal statute (GA. CODE ANN. § 26-9901) prohibiting under all circumstances the disclosure of the name of a victim of a rape or an attempted rape does not violate the First Amendment to the Constitution of the United States.[2] The Court further held that because of this statute, the disclosure of the identity of the victim of such a crime is not a matter of public interest and general concern in the State of Georgia.[3] The Court concluded that the First Amendment does not bar the plaintiff's claim[4] and remanded the case to the trial court with instructions to submit the case to the jury to determine if "reasonable men would find the invasion highly offensive."[5]

Thus, the Supreme Court of Georgia has rendered a final judgment that the First and Fourteenth Amendments to the Constitution of the United States do not protect the appellants' actions in broadcasting the truthful news re-

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1. "And in formulating such an issue for determination by the fact-finder, it is reasonable to require the Appellee to prove that the Appellants invaded his privacy with wilful or negligent disregard for the fact that reasonable men would find the invasion highly offensive." Appendix to Jurisdictional Statement, A-17.

2. "We hold that this 1968 Georgia statute is not unconstitutional." Appendix to Jurisdictional Statement, A-26.

3. ". . . and because of this statute the disclosure of the identity of the victim of such a crime is not a matter of public interest and general concern in this state." Appendix to Jurisdictional Statement, A-26.

4. "First Amendment proscriptions do not bar the claim of the Appellee against the Appellants in this case." Appendix to Jurisdictional Statement, A-21.

5. See Appendix to Jurisdictional Statement, A-17.

port of which the plaintiff complains. The Supreme Court of Georgia has also rendered a final judgment that GA. CODE ANN. § 26-9901 does not abridge the freedom of the press guaranteed to the appellants by the First and Fourteenth Amendments to the Constitution of the United States.[6]

Although remanding this case to the Georgia trial court for further proceedings, the decision of the Supreme Court of Georgia constitutes a final judgment on controlling issues of federal constitutional law. The judgment of the Supreme Court of Georgia is binding upon the trial court and not subject to further review in Georgia.

The decision of the Georgia Court seriously erodes the protection which the First Amendment affords newscasters to publish truthful accounts of matters of public interest.[7] The federal claims presented for review here are separate from the issues still to be determined in a state court trial, i.e., whether defendants' actions invaded plaintiff's right of privacy, and if so, to what extent. Determination of defendants' First Amendment claim may avoid a long and costly trial and subsequent appeals. Finally, defendants' claim does present a question which is fundamental to the case and yet is independent of what will be in issue at any subsequent state court trial.

The Supreme Court of Georgia rendered its decision on September 5, 1973 (A. 56). On September 19, 1973 the Supreme Court of Georgia denied a petition for rehearing

6. Although the Georgia Court speaks generally in terms of the First Amendment, the Court acknowledged: "The protections to speech and press contained in the First Amendment to the Constitution of the United States are made applicable to the State of Georgia by the Fourteenth Amendment." Appendix to Jurisdictional Statement, A-18.

7. *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *New York Times* v. *Sullivan*, 376 U.S. 254 (1964).

(Appendix to Jurisdictional Statement, A-24). Timely notice of appeal to this Court was filed in the Supreme Court of Georgia and the Superior Court of Fulton County, Georgia on December 6, 1973 (Appendix to Jurisdictional Statement, A-27, 29). On December 17, 1973 appellants filed their Jurisdictional Statement in this Court.

On February 19, 1974 this Court entered an order as follows:

> "In this case jurisdiction is postponed to the hearing of the case on the merits." ..... U.S. .....

In the alternative, should this Honorable Court not consider the decision of the Supreme Court of Georgia reviewable by means of an appeal under 28 U.S.C. § 1257 (2), the appellants respectfully request that pursuant to 28 U.S.C. § 2103, the papers whereupon this appeal is taken be regarded and acted upon as a Petition for a Writ of Certiorari within the Court's jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

The Constitutional provisions which appellants contend the judgment of the Supreme Court of Georgia violates are the following clauses of the First Amendment to the CONSTITUTION OF THE UNITED STATES, to wit:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press"

and the following clause of the Fourteenth Amendment to the Constitution of the United States, to wit:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

This case also involves 1968 GA. LAWS, pp. 1335, 1336 (GA. CODE ANN. § 26-9901) which provides:

> "It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor."

QUESTIONS PRESENTED

1.

Whether the Court has jurisdiction to hear this appeal.

2.

Whether GA. CODE ANN. § 26-9901, as construed and applied by the Supreme Court of Georgia, abridges the freedom of speech and press and denies due process of law and is overly broad on its face and in its application in violation of the First and Fourteenth Amendments to the United States Constitution.

3.

Whether, consistent with the requirements of the First and Fourteenth Amendments to the Constitution of the United States, the Georgia General Assembly has the

power to regulate the contents of publications by the news media by legislatively declaring what information and facts are of public interest.

4.

Whether the Supreme Court of Georgia erred in holding that the First and Fourteenth Amendments to the United States Constitution do not bar this action for damages against appellants (a news media and its reporter) for the truthful publication of a matter of public interest and a matter of public record—i.e., the name of the deceased victim of a murder-rape, in the course of a timely news story concerning the trial of those accused of the crime.

5.

Whether the Georgia Court erred in holding that appellants may be liable for publishing the victim's name in the course of a news report of the trial of those accused of murder and rape because the constitutional protections afforded the truthful publications of matters of public interest include the privilege to discuss or publish any fact rationally related or relevant to the subject matter of public interest.

STATEMENT OF THE CASE

Cynthia Leslie Cohn died on August 18, 1971 under circumstances which led to a Fulton County Grand Jury's indictment of six young men on March 3, 1972 for her murder and rape (A. 19). Each of the indictments handed down by the Grand Jury became part of the public records of the court, and each named Cynthia Cohn as the victim (A. 23, 25).

On April 10, 1972 appellant Wassell, acting in his capacity as a news reporter for WSB-TV, attended the trial of the six indicted defendants at the Fulton County Courthouse (A. 16). During these proceedings, held in open court, the State moved to dismiss the murder indictments against all defendants. Thereafter, five of the six defendants entered guilty pleas to the remaining rape indictment. The sixth defendant first pleaded guilty, but during the proceedings thereafter withdrew his plea of guilty and demanded a jury trial (A. 20, 21).

The Court was advised by the District Attorney that "the girl's family felt that a lenient five-year sentence would serve justice" (A. 20). The Court then imposed sentence upon the five defendants who had pleaded guilty (A. 20, 21).

Following the proceedings in open court, appellant Wassell prepared a news report which was subsequently filmed on the steps of the Fulton County Courthouse (A. 13). This news report was based on information obtained at the trial and from the indictments on record with the Clerk of the Superior Court of Fulton County (A. 17, 18).

The filmed news report related exclusively to the proceedings which had transpired in Court that day and to the subsequent transfer of four of the six defendants from the Fulton County Courthouse to Fulton County Jail (A. 17).

In the course of this filmed news report, appellant Wassell identified the crimes of murder and rape, with which these defendants were charged, by reference to the name of the deceased victim, Cynthia Cohn (A. 18). The opening lines of the filmed report contained the sole reference to the victim's name:

> "Six youths went on trial today for the murder-rape of a teenaged girl.
>
> "The six Sandy Springs high school boys were charged with murder and rape in the death of seventeen year old Cynthia Cohn following a drinking party last August 18.
>
> "The tragic death of the high school girl shocked the entire Sandy Springs community. Today the six boys had their day in court.
>
> "There was no jury. The six boys, through their lawyers, threw themselves on the mercy of the court . . . and the presiding judge, Sam Phillips McKenzie. . . .
>
> "Judge McKenzie dropped the murder charge against all six . . . and proceeded with the charge of rape. The DA told the judge all six defendants wished to plead guilty . . . and not have a jury trial. The DA told the court the girl's family felt that a lenient 5 year sentence would serve justice and he recommended a five year sentence" (A. 19, 20).

The filmed news report related the names of the six defendants and the fact that the murder charges had been dropped against all of the defendants (A. 20). The news report also indicated that five of the defendants pleaded guilty to the charges of rape and that one defendant pleaded guilty and then withdrew his plea (A. 20, 21). The recommendations of the plaintiff concerning sentences as well as the sentences imposed on each defendant were also reported (A. 20, 21).

WSB-TV thereafter televised the filmed news report during the course of its regularly scheduled news program

at 6:00 p.m. on April 10, 1972 and again during the early morning hours of April 11, 1972 (A. 6).

On May 8 ,1972 Martin Cohn filed his Complaint against Cox Broadcasting Corporation, the owner and licensee of WSB-TV, and reporter Thomas Wassell, alleging that the defendants had televised or caused to be televised willfully, unlawfully, negligently, and in violation of the GA. CODE ANN. § 26-9901 the name of the plaintiff's deceased daughter, Cynthia Leslie Cohn. The Complaint alleged that the broadcast resulted in the invasion of the plaintiff's right of privacy (A. 4). The Complaint further demanded a judgment against defendants for $1,000,000 (A. 4).

The defendants answered the Complaint on June 7, 1972 and asserted, *inter alia*,[8] that their actions were privileged under the First and Fourteenth Amendments to the Constitution of the United States (A. 9). On October 24, 1972 the defendants timely amended their answer to add the affirmative defense that GA. CODE ANN. § 26-9901, to the extent the statute applied to the actions of the defendants, was an unconstitutional abridgement of freedom of speech and press in violation of the First and Fourteenth Amendments to the Constitution of the United States (A. 42).

There being no dispute as to any material fact, the plaintiff and the defendants thereafter filed cross Motions

8. It is interesting to note that appellants also raised the issue that the statute was totally inapplicable to the instant action in that it applied only to the situation where the rape victim in question is living at the time of the publication. As stated heretofore, the said rape victim in this action died approximately *eight (8) months* prior to the publication of appellants—the publication being at the time of the trial of accused defendants and not at the time of the murder-rape incident.

The Georgia Supreme Court avoided ruling on this contention by holding initially that the said Georgia statute (GA. CODE ANN. § 26-9901) did not support a civil cause of action.

for Summary Judgment with accompanying affidavits[9] (A. 11, 16, 26).

On December 13, 1972 the Superior Court of Fulton County entered an order and written opinion[10] granting the plaintiff's Motion for Summary Judgment on the issue of liability and denying the defendants' Motion for Summary Judgment. The trial court held that GA. CODE ANN. § 26-9901 states a rule of civil conduct which the defendants had violated and for which they were liable in damages (Appendix to Jurisdictional Statement, A-4, 5). The Court expressly considered the restrictions on speech and press presented by the statute, but held that the restrictions were not unreasonable.[11]

On December 22, 1972 the defendants filed a Motion to Reconsider in the trial court (A. 47). In this Motion the defendants again raised the federal constitutional issues for the Court's consideration (A. 48, R. 317).

On December 29, 1972 after hearing oral arguments, the Superior Court reaffirmed and adhered to its Order and Opinion of December 13, 1972 (A. 49). The Court certified that the Order should be subject to review by direct appeal in the Georgia Supreme Court (A. 50).

On January 9, 1973 the defendants filed an appeal in the Supreme Court of Georgia to review the trial court's Orders of December 13 and December 29, 1973, granting the plaintiff's Motion for Summary Judgment on the issue

9. The defendants objected to and moved to strike the conclusions and self-serving hearsay contained in the plaintiff's affidavits (A. 27). However, the trial court found it unnecessary to rule on the defendants' objections because the Court relied only upon that portion of plaintiff's affidavits which established that he was the father (Appendix to Jurisdictional Statement, A-2).

10. Appendix to Jurisdictional Statement, A-1—A-6.

11. Appendix to Jurisdictional Statement, A-4.

of liability and denying the defendants' Motion for Summary Judgment (A. 50).

Before the Supreme Court of Georgia the defendants again asserted, *inter alia*, that their actions were privileged under the First and Fourteenth Amendments to the Constitution of the United States [Appellants' Assignments of Error Nos. 4, 10] (A. 53), and that GA. CODE ANN. § 26-9901, to the extent that the statute applied to their actions, violated the First and Fourteenth Amendments to the Constitution of the United States [Appellants' Assignments of Error Nos. 12, 13] (A. 55).

On September 5, 1973 the Supreme Court of Georgia, in a divided opinion (4-3), affirmed the judgment of the trial court in part, reversed in part, and remanded with direction (A. 56). The Court held that GA. CODE ANN. § 26-9901 does not give rise to a civil cause of action and thus the Court unanimously reversed the entry of summary judgment for the plaintiff on the issue of liability.[12]

However, a majority (4-3) of the Supreme Court of Georgia affirmed the denial of the defendants' Motion for Summary Judgment (A. 56). The Court expressly considered the "head-on collision between the tort of public disclosure and First Amendment rights of freedom of speech and press." The majority (4-3) of the Court concluded:

> "First Amendment proscriptions do not bar the claim of the Appellee against the Appellants in this case." (Appendix to Jurisdictional Statement, A-21).

The majority held that the defendants would be liable for money damages if a jury finds that the defendants invaded the plaintiff's privacy by publishing the name of the victim "with wilful or negligent disregard for the

12. Appendix to Jurisdictional Statement, A-12, A-13.

fact that reasonable men would find the invasion highly offensive."[13]

The three dissenting Justices of the Georgia Supreme Court concluded that the actions of the defendant were privileged under the First Amendment as a publication of information regarding a matter of public interest (Appendix to Jurisdictional Statement, A-22).

The appellants moved for rehearing in the Supreme Court of Georgia and once again asserted their claims of privilege under the First and Fourteenth Amendments to the Constitution of the United States (A. 56).

On September 19, 1973 the Supreme Court of Georgia denied the appellants' Motion for Rehearing and expressly ruled that the 1968 Georgia criminal statute (GA. CODE ANN. § 26-9901) was constitutional. The Court held that because of this statute, the disclosure of the identity of the victim of a rape or an attempted rape is not a matter of public interest and general concern in the State of Georgia. Thus, the Court concluded that such a disclosure was not within the protection of the First Amendment:

> "A majority of this Court does not consider this statute to be in conflict with the First Amendment. We think the General Assembly of Georgia had a perfect right to declare that the victim of such a crime should not be publicly identified by the news media. The First Amendment is not absolute; and we consider this statute to be a legitimate limitation on the right of freedom of expression contained in the First Amendment.
>
> "There simply is no public interest or general concern about the identity of the victim of such a

13. Appendix to Jurisdictional Statement, A-17.

crime as will make the right to disclose the identity of the victim rise to the level of First Amendment protection.

. . .

"We hold that this 1968 Georgia statute is not unconstitutional, and because of this statute the disclosure of the identity of the victim of such a crime is not a matter of public interest and general concern in this state." (Appendix to Jurisdictional Statement, A-24—A-26).

ARGUMENT

I.

INTRODUCTION AND SUMMARY

The defendants' news report, which is the subject of this action, concerns public court proceedings wherein the State sought to dismiss indictments for murder; where guilty pleas to charges of rape were entered and subsequently withdrawn; and where the court imposed sentences on those accused of a particular notorious crime (A. 6 and A. 19-22). This report was the essence of truthful and accurate comment on the actions of public officials and the report constituted timely news coverage of an event of widespread public interest (A. 6).

The plaintiff's suit is predicated on the defendants' alleged violation of GA. CODE ANN. § 26-9901 by publishing the name of the victim in the course of the news story. The defendants have steadfastly maintained that the admitted publication was privileged under the First and Fourteenth Amendments and that if GA. CODE ANN. § 26-9901 applied to their actions, the statute is an unconstitutional abridgment of the freedom of the press.

These constitutional questions were raised and ruled upon in the trial court and in the Supreme Court of Georgia. The trial court held the statute valid, the publication unprotected by the constitutional guarantees of free speech and press, and the defendants liable as a matter of law.[14]

The Supreme Court affirmed the trial court's rulings on the constitutional questions, but remanded for a jury to determine whether the publication actually invaded the plaintiff's privacy and whether the invasion was "with

14. Appendix to Jurisdictional Statement, A-4, 5.

wilful or negligent disregard for the fact that reasonable men would find the invasion highly offensive."[15] Thus, the Georgia Supreme Court has conclusively determined the constitutional issues presented by this case. The decision below is "final" for the purposes of 28 U.S.C. § 1257 (2).

The decisions of the Supreme Court of Georgia strip the defendants of their constitutional privilege to publish matters of public interest and vest the legislature with the constitutionally forbidden[16] authority to regulate the news media's publication of matters of public interest and facts of public record according to the legislature's judgment of the publication's "social value." The enormity of the constitutional errors of the Georgia courts and the grave implications and consequences to First Amendment freedoms which such decisions may foster compel the appeal to this Honorable Court.

The errors and deficiencies of the decision of the Georgia Supreme Court here on appeal are not difficult to detect and indeed are lucidly obvious to the reader cognizant of current constitutional principles and decisions in the First Amendment area, to wit:

1. In upholding the constitutionality of GA. CODE ANN. § 26-9901, the Georgia Supreme Court has totally failed to apply and to adhere to the constitutional principle expressed in this Court's opinions that the State's power to regulate speech and press is extraordinarily narrow and exists, if at all, only upon a showing of grave and immediate danger to interests

15. Appendix to Jurisdictional Statement, A-17, 21, 26.

16. *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971).

which the State may lawfully protect. See *Herndon* v. *Lowry*, 301 U.S. 242 (1937).

No "compelling" state interest has been shown which would justify the limitations which the Georgia statute imposes on the constitutional privilege to truthfully discuss and publish matters of public interest.[17]

By its terms GA. CODE ANN. § 26-9901 applies only to the media of public dissemination, and the unmistakable purpose of this legislation, as evidenced by its recent amendment,[18] is to regulate the content of the news media.

The subject matter of this statutory prohibition, the name or identity of a rape victim, is clearly related to the public's serious and legitimate interest in learning of the violations and enforcement of criminal law. In many instances, as here, the name of the victim can itself be a matter of public interest. Publication of the name or identity of a rape victim can serve the public interest: in the tragedies which befall victims of crimes; in seeing that victims of crimes receive proper care and support; in facilitating the prosecution of criminal violations by identifying and securing possible prosecution and defense witnesses; and in assuring that the criminal processes in a particular case are proceeding without either subterfuge

17. *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971); *Wagner* v. *Fawcett Publications*, 307 F.2d 409 (7th Cir. 1962), 372 U.S. 909 (1963); *Hubbard* v. *Journal Publishing Co.*, 69 N.M. 473, 368 P.2d 147 (1962); *Waters* v. *Fleetwood*, 212 Ga. 161, 91 S.E.2d 344 (1956); *Jenkins* v. *Dell Publishing Company, Inc.*, 251 F.2d 447 (3rd Cir. 1958).

18. The Georgia statute was first passed in 1911. 1911 GA. LAWS, p. 179, GEORGIA CRIMINAL CODE ANN. § 343 (1914). The statute was recodified as GA. CODE ANN. § 26-2105 (1953). In 1968 the present version of the statute was enacted expanding the prohibitions to include the broadcast media.

or harassment. Publication of the name of the victim of such a crime is certainly well within the broad definition of "public interest" which has emerged in those cases dealing with the issue.[19]

The statute, therefore, blatantly pierces the sphere of constitutional freedoms and accordingly is unconstitutional.[20]

2. In rejecting appellants' contention that GA. CODE ANN. § 26-9901 is unconstitutionally overbroad, the Georgia Court has ignored the limitations which this Court has applied to statutes which regulate First Amendment activities. *See, e.g., Shelton* v. *Tucker,* 364 U.S. 479 (1960); *NAACP* v. *Alabama,* 377 U.S. 288 (1964). This Court has repeatedly stated "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker,* 364 U.S. at 488 (1960). The Georgia Supreme Court has totally failed to apply the over-

19. *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967); *Rosenbloom* v. *Metromedia,* 403 U.S. 29 (1971); *Kois* v. *Wisconsin,* 408 U.S. 229 (1972); *Time, Inc.* v. *Johnston,* 448 F.2d 378 (4th Cir. 1971); *Bon Air Hotel, Inc.* v. *Time, Inc.,* 426 F.2d 858 (5th Cir. 1970); *Cantrell* v. *Forest City Publishing Company,* ..... F.2d ..... (6th Cir. 1973); *Jenkins* v. *Dell Publishing Company, Inc.,* 251 F.2d 447 (3rd Cir. 1958); *Waters* v. *Fleetwood,* 212 Ga. 161, 91 S.E.2d 344 (1956).

20. This sphere of constitutionally protected speech, as defined by the rulings of this Court, includes comments regarding public officials, public figures, and matters of public interest. *New York Times* v. *Sullivan,* 376 U.S. 254 (1967); *Curtis Publishing Company* v. *Butts,* 388 U.S. 130 (1967); *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967); *Rosenbloom* v. *Metromedia,* 403 U.S. 29 (1971). As we discuss hereinafter in the brief, numerous circumstances may be envisioned when the name or identity of a rape victim would involve a public official or public figure or would be a matter of legitimate public interest. See p. 39 of this Brief, *infra.*

breadth doctrine[21] and has constitutionally approved a statute which broadly and imprecisely proscribes action and conduct that are clearly protected by the First Amendment.[22]

3. The decision of the Supreme Court of Georgia upholding the constitutionality of GA. CODE ANN. § 26-9901 confers upon the General Assembly the power to regulate by fiat the news media's truthful publication of matters of public record in accordance with the General Assembly's view of what are "mat-

21. However, the overbreadth doctrine is not unknown to the Georgia Supreme Court and has been applied on numerous occasions. *Sanders* v. *Georgia,* 231 Ga. 608, 203 S.E.2d 153 (1974); *City of Atlanta* v. *Twentieth Century-Fox Film Corp.,* 219 Ga. 271 (1963); *K. Gordon Murray Productions, Inc.* v. *Floyd,* 217 Ga. 784 (1962). In *Sanders* v. *Georgia, supra,* the Georgia Supreme Court recently noted:

> *"However, the overly broad coverage contemplated by this statute and ordinance creates a chilling effect upon the exercise of free expression.* We cannot throw out the protected to rid ourselves of the unprotected as these laws would require. To apply this statute and ordinance literally to the appellant's book store creates an in terrorem effect on the exercise of freedoms guaranteed and cherished under both State and Federal Constitutions. *We must use the deft, the precise and the remedial incision of the surgeon rather than the bludgeoning blow of the butcher to cut away cancerous obscenity.* If we do not, the body politic will suffer too mortal a blow from our zeal to have a decent society free of obscene publications but otherwise full of poetry and prose.
>
> We hold, therefore, that both Section 2 of Ga. L. 1971, pp. 888, 889 (Code Ann. § 23-3402) and the DeKalb County ordinance (Code of DeKalb County, Part II, Ch. 10, Art. VI) *are unconstitutional on their face for overbreadth, through the imposition of criminal and civil sanctions for the exercise of otherwise protected speech and expression"* (emphasis added). 231 Ga. at 614, 203 S.E.2d at 157.

22. For example, this statute prohibits the publication of the name or identity of a rape victim irrespective of truth or falsity, reasonableness, newsworthiness of the event or the person, timeliness, or public interest. Such a broad and indiscriminate statutory prohibition certainly is not in harmony with this Court's overbreadth decisions. *Shelton* v. *Tucker,* 364 U.S. 479 (1960); *Zwickler* v. *Koota,* 389 U.S. 241 (1967); *Baggett* v. *Bullitt,* 377 U.S. 360 (1964); *Stanley* v. *Georgia,* 394 U.S. 557 (1969). See additional decisions cited at pages 41, 42 of this brief, *infra.*

ters of public interest and general concern" within the State of Georgia (Appendix to Jurisdictional Statement, A-26). Under the decision of the Supreme Court of Georgia, the Georgia General Assembly may decide what matters are of public interest and limit the news media's publication to those facts. The majority of the Supreme Court of Georgia adopts this novel position without discussion or even citation of a single decision of the Supreme Court of the United States. Such a position is directly contrary to the entire constitutional principle underlying the First Amendment.

By its terms the First Amendment to the Constitution seeks to prevent the legislative branch of government from enacting laws which abridge the freedom of speech or of the press. Such a proscription is an express limitation on legislative power; but in the case at bar, the Georgia Supreme Court has permitted the legislative branch to pass beyond the confines of that express limitation. The legislature in Georgia now has the power to demark the areas of news coverage. Thus the decision effectively eliminates this constitutional limitation.[23]

4. Contrary to the rulings of this Court that no penalty, civil or criminal, may be imposed upon the truthful publication of matters of public interest, the Georgia Supreme Court in the case at bar has held

23. In this regard, Chief Justice Marshall observed as early as 1803 in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 176 (1803): "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation."

that the defendants may be held liable for civil damages. *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Rosenbloom* v. *Metromedia*, 403 U.S. 29 (1971). The Georgia Supreme Court has employed an erroneous rationale in reaching its decision totally contrary to the guidelines established by this Court for resolution of cases in the First Amendment libel-privacy area.

The Georgia Supreme Court ultimately decided the instant action by approving utilization of an *ad hoc* balancing approach which placed on the scales the various societal and individual interests relating to the instant case.

This aberration from binding and controlling precedents fosters media uncertainty and self-censorship. Beginning with *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), this Court has expressly rejected such an *ad hoc* balancing approach. This Court has defined, without any *ad hoc* balancing of interests, the kinds of speech that are constitutionally protected from libel and privacy judgments except upon clear and convincing proof of constitutionally defined "malice." These protected areas of free speech as defined by this Court include comments on actions of public officials, *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), comments on the action of public figures, *Curtis Publishing Company* v. *Butts*, 388 U.S. 130 (1967), and comments on matters of public interest,[24] *Time, Inc.* v. *Hill*, 385 U.S 374 (1967); *Rosenbloom* v. *Metro-*

24. Under the above decisions, as applied to comments on public officials, public figures, and matters of general or public interest, recovery is permitted only if it is shown by clear and convincing proof that the defendants knew of the falsity of the statement or their actions were characterized by a reckless disregard of the truth or falsity (i.e., "actual malice").

media, 403 U.S. 29 (1971). This Court has applied the same rationale and standard to both libel-slander cases (*Sullivan, Butts,* and *Rosenbloom*) and to actions predicated on an invasion of privacy (*Hill*).

The Georgia Supreme Court totally disregarded these controlling precedents when it utilized an *ad hoc* balancing approach and remanded the case to the trial court for a jury determination on a "highly offensive" standard,[25] a standard which fails completely to meet the constitutional requirements articulated by this Court.

In the case at bar, the defendants respectfully submit that a proper application of contemporary constitutional doctrine compels the conclusions that the defendants' publication constituted the exercise of the rights of free speech and press to which they are constitutionally entitled, more particularly:

1. Since the publication in question related to a matter of public interest, the defendants' actions should have been held to be privileged under the rationale and holdings of *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), and *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967).

2. Since the critical fact in the publication of which the plaintiff complains, i.e., the name of the murder-rape victim, was contained in the criminal indictments and is a matter of public record, the Georgia Court should have held that under the decisions of this Court the news media is constitutionally entitled to truthfully publish all matters of public record.[26]

3. The defendants would submit that constitutional protection afforded the publication of matters of public interest necessarily extends to and includes the truthful publication of all facts which are published as a part of and are rationally related and relevant to a news story concerning a matter clearly of public interest. Such a rule is required under the holdings and rationale of this Court in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny and has been articulated in this Court's decisions in *Time, Inc.* v. *Pape*, 401 U.S. 279, 290 (1971) ["rational interpretation"], and in *Kois* v. *Wisconsin*, 408 U.S. 229, 231 (1972) ["rationally related"].

Defendants respectfully submit that each of these approaches is consistent with the rationale and holdings of this Court and each supports the principles articulated by this Court to provide the certainty of constitutional protection which is needed to fulfill the historic role and meaning of the First Amendment. Suffice it to say, the decision by the Georgia Supreme Court in the case at bar totally fails in this regard and accordingly should be reversed.

25. Specifically, the Georgia Supreme Court held: "Although the Appellee's complaint in this case stated a claim for relief, the public disclosure, admitted by the Appellants did not establish liability on the part of the Appellants as a matter of law. Whether the public disclosure actually invaded the Appellee's 'zone of privacy,' and if so to what extent, are issues to be determined by the fact-finder. And in formulating such an issue for determination by the fact-finder, it is reasonable to require the Appellee to prove that the Appellants invaded his privacy '*with wilful or negligent disregard for the fact that reasonable men would find the invasion highly offensive*'" (emphasis added). 231 Ga. at 64.

26. *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971); *Rosenbloom* v. *Metromedia*, 403 U.S. 29 (1971). See also *Hubbard* v. *Journal Publishing Co.*, 69 N.M. 473, 368 P.2d 147 (1962); *Frith* v. *Associated Press*, 176 F.Supp. 671 (E.D. S.C. 1959).

II.

THIS COURT HAS JURISDICTION TO HEAR THIS APPEAL

In its order of February 19, 1974, this Court postponed further consideration of the jurisdiction until the argument on the merits. The appellants respectfully submit that all of the elements necessary for jurisdiction are present in this case and that the judgment of the Supreme Court of Georgia is final within the meaning of 28 U.S.C. § 1257(2).[27]

In the decision below, the Supreme Court of Georgia upheld the constitutionality of GA. CODE ANN. § 26-9901[28] and found that because of this statute the plaintiff's action was not constitutionally barred and the defendants' publication as complained of was not protected within the First and Fourteenth Amendments.[29] The decision of the Georgia Supreme Court is a final determination of the federal constitutional issues in this case, not subject to further review in Georgia and binding upon the trial court.

The plaintiff[30] and the defendants[31] both contend that no dispute exists as to any material fact in this case. The issues of fact which the Georgia Supreme Court remanded

27. "Final judgments or decrees rendered by the highest court of the State in which a decision could be had, may be reviewed by the Supreme Court . . . (2) by appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

28. Appendix to Jurisdictional Statement, A-26.

29. Appendix to Jurisdictional Statement, A-24, 25.

30. See Appellee's Motion to Dismiss or Affirm, p. 2.

31. Appellants' Jurisdictional Statement, pp. 9-10.

for determination[32] are wholly unrelated and separate from the constitutional issues before this Court. In addition, the Supreme Court of Georgia determined that the undisputed facts in this record were sufficient to permit their final, and now binding, judgment that "First Amendment proscriptions do not bind the claim of the Appellee against the Appellants in this case."[33]

In its decision the Supreme Court of Georgia concluded that although GA. CODE ANN. § 26-9901 does not of itself give rise to a civil cause of action for invasion of privacy,[34] the statute establishes the public policy of Georgia.[35] In the opinion for the majority of the Court on the motion for rehearing in the Supreme Court of Georgia, the Court held that

> "A majority of this Court does not consider this statute to be in conflict with the First Amendment. We think the General Assembly of Georgia had a perfect right to declare that the victim of such a crime should not be publicly identified by the news media. The First Amendment is not absolute; and we consider this statute to be a legitimate limitation on the right of freedom of expression contained in the First Amendment. . . .

32. "Whether the public disclosure actually invaded the Appellee's 'zone of privacy,' and if so to what extent, are issues to be determined by the fact-finder. And in formulating such an issue for determination by the fact-finder, it is reasonable to require the Appellee to prove that the Appellants invaded his privacy with wilful and negligent disregard for the fact that reasonable men would find the invasion highly offensive." (Appendix to Jurisdictional Statement, A-17).

33. Appendix to Jurisdictional Statement, A-21.

34. Appendix to Jurisdictional Statement, A-12.

35. *Id.*

"We hold that this 1968 Georgia statute is not unconstitutional, and because of this statute the disclosure of the identity of the victim of such a crime is not a matter of public interest and general concern in this state."[36]

This Court has long held that the requirement of finality is to be given a "practical rather than a technical construction"[37] and accordingly has employed a pragmatic approach to the question of "finality."[38] This practical construction of the requirement of finality is intended to facilitate "the smooth working of our federal system"[39] and to assure that where no factual or legal questions affect a definitive determination of the constitutional issues before the United States Supreme Court, this Court may act without undue delay to protect important federal substantive rights.[40] Thus, this Court has consistently found the requisite finality whenever the highest state court has conclusively determined the constitutional questions and the issues remaining to be resolved are unrelated to the constitutional questions before this Court.[41]

36. Appendix to Jurisdictional Statement, A-24-26.

37. *Gillespie* v. *U. S. Steel Corp.*, 379 U.S. 148, 152 (1964); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

38. See *Brown Shoe Company, Inc.* v. *United States*, 370 U.S. 294, 306 (1962); *Pope* v. *Atlantic Coast Line Railroad Company*, 345 U.S. 379, 381-83 (1953).

39. *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945).

40. See *Brady* v. *Maryland*, 373 U.S. 83 (1963). This rationale has been particularly emphasized where the Court has recognized that delay would threaten the exercise of the First Amendment rights. See *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415, fn. 1 (1971); *Mills* v. *Alabama*, 384 U.S. 214 (1966).

41. *Local No. 438* v. *Curry*, 371 U.S. 542 (1963); *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963); *Mills* v. *Alabama*, 384 U.S. 214 (1966); *Rosenblatt* v. *American Cyanamid Co.*, 15 L. Ed. 2d 39, 86 S. Ct. 1 (1965) (opinion of Mr. Justice Goldberg not reported in *U.S. Reports*); *Brady* v. *Maryland*, 373 U.S. 83 (1963); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores*, 38 L. Ed. 2d 379, 94 S. Ct. ..... (Dec. 5, 1973).

In determining whether the requirement of finality has been met, this Court has focused on the following criteria: whether the state judgment was a final ruling on the federal claim binding on lower state courts, with no further review possible in the state court system, *Rosenblatt* v. *American Cyanamid Co.*, 15 L. Ed. 2d 39, 86 S. Ct. 1 (1965); *Local No. 438* v. *Curry*, 371 U.S. 542 (1963); whether postponing review would seriously erode a national policy, *Local No. 438* v. *Curry, supra, Rosenblatt* v. *American Cyanamid Co., supra, Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963); whether the claim sought to be reviewed was separate from the factual and legal issues still to be determined in a state trial, *Brady* v. *Maryland*, 373 U.S. 83 (1963), *Mercantile National Bank* v. *Langdeau, supra, Local 438* v. *Curry, supra, Rosenblatt* v. *American Cyanamid Co., supra;* and finally, whether determination of the preliminary federal claim might avoid subsequent litigation. *Mercantile National Bank* v. *Langdeau, supra.*

Tested against these criteria the judgment of the Supreme Court of Georgia presents the requisite "finality" for review under 28 U.S.C. § 1257(2). The judgment is a final ruling on the constitutionality of the Georgia statute and a final rejection of the defendants' assertion of their First Amendment privilege. The judgment is binding on the lower State courts with no further review possible in those courts;[42] postponing a review of the constitutional issue will seriously erode the protection which the First Amendment affords newscasters;[43] the federal claim presented for review is separate from the issues still

42. *Rosenblatt* v. *American Cyanamid Co.*, 15 L. Ed. 2d 39, 86 S. Ct. 1 (1965); *Local No. 438* v. *Curry*, 371 U.S. 542 (1963).

43. *Id.* See also, *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963).

to be determined in the State proceedings;[44] and determination of the appellants' First Amendment claim may avoid a long and costly trial and subsequent appeals[45] because further proceedings will be necessary only if this Court affirms the judgment of the Supreme Court of Georgia.

The highest court in Georgia has said that the statute is constitutional and because of the statute the defendants' activities were not constitutionally privileged. The defendant may win or lose this suit on the basis of a jury's determination of the non-constitutional issues of whether the defendants' publication actually invaded the plaintiff's privacy and if so, whether reasonable men would find the invasion "highly offensive." But the statute will have been validated in Georgia for all time unless this Court changes that result. Furthermore, should the plaintiff prevail on the judgment for damages, the defendants will again have to seek the only available review of the constitutional issues.

To postpone review of the constitutional questions now ripe for discussion on the possible premise that these defendants might prevail in the trial court or until another identical controversy returns the issue to this Court, will surely produce "a completely unnecessary waste of time and energy."[46] Given the "chilling effect" on First Amendment rights, such a result may be viewed as an intolerable invitation to legislatures to exercise a power similar to that which the Supreme Court of Georgia approved to enact varying regulations as to the content of the press.[47]

44. *Id.* See also, *Brady* v. *Maryland*, 373 U.S. 83 (1963).

45. *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963).

46. *Mills* v. *Alabama*, 384 U.S. 214, 217 (1966); *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores*, 38 L. Ed. 2d 379, 94 S. Ct. ____ (Dec. 5, 1973).

47. Appellants have been advised that the legislature of North Carolina is presently considering enactment of legislation similar to GA. CODE ANN. § 26-9901.

At every stage in this litigation Cox Broadcasting and Thomas Wassell have raised the constitutional issues with respect to the validity of GA. CODE ANN. § 26-9901 and have asserted that their publication in this case is constitutionally privileged. The defendants first raised the federal constitutional question in their answer.[48] The trial court in its original opinion[49] considered and expressly rejected these assertions. The constitutional questions were reargued to the trial court and in the defendants' Motion to Reconsider.[50] The issues were preserved and presented on appeal to the Supreme Court of Georgia.[51] The Supreme Court of Georgia considered the constitutional issues and decided in favor of the validity of GA. CODE ANN. § 26-9901, holding as well that the defendants' publication was not privileged under the First and Fourteenth Amendments.[52]

The judgment of the Georgia Supreme Court raises the substantial federal question of whether or not the legislative branch of government has the power to determine by fiat what "facts" should not be published because the legislature does not consider them to be of public interest and concern. The judgment in effect seats the legislature at the editor's desk and confers upon the legislature the power to regulate the content of the news reported in the mass media. The decision is a grave precedent which clearly threatens the free and vigorous press which has been acknowledged universally as vital to the American concept of liberty.[53]

48. A. 9.

49. Appendix to Jurisdictional Statement, A-4.

50. A. 47.

51. A. 52-55.

52. Appendix to Jurisdictional Statement, A-21, 24, 25.

53. *Thornhill* v. *Alabama*, 310 U.S. 88, 94 (1940).

Accordingly the appellants respectfully submit that all of the requisites of 28 U.S.C. § 1257(2) are fulfilled in the case now pending before this Court. However, should the Court consider that appeal is not the appropriate procedure to be followed, then pursuant to 28 U.S.C. § 2103, the appellants respectfully request the Court to act upon the papers whereupon this appeal is taken as Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1257 (3).

III.

FEDERAL CONSTITUTIONAL QUESTIONS

A.

Ga. Code Ann. § 26-9901 As Construed and Applied by the Supreme Court of Georgia Abridges the Freedom of Speech and Press Guaranteed by the First and Fourteenth Amendments to the Constitution.

In challenging the constitutionality of 1968 GA. LAWS, pp. 1335, 1336 (GA. CODE ANN. § 26-9901)[54] as well as the decisions of the Georgia Supreme Court in this case, the defendants would commence by examining, rather than assuming, the power of the Georgia legislature to regulate the truthful publication of matters of public interest and facts appearing on the public record.

54. "It shall be unlawful for any news media or other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for misdemeanor."

The State's power to regulate speech is extraordinarily narrow in scope and exists, if at all, only upon a showing of grave and immediate danger to interests which the State may lawfully protect.[55] The decisions of this Court have defined the permissible areas of proper State regulation of First Amendment activity. For instance, in *Herndon* v. *Lowry*, 301 U.S. 242 (1937), a case holding unconstitutional a Georgia penal statute which proscribed the solicitation of members for a political party advocating violence in the overthrow of organized government, this Court stated:

> "The power of a state to abridge freedom of speech . . . is the exception rather than the rule . . . [and any] limitation upon individual liberty must [to avoid unconstitutionality] have appropriate relation to the safety of the State."[56]

Underlying this Court's evaluation of various State imposed restrictions upon the freedoms of speech and press has been the realization that "the safeguarding of [freedom of speech and press] to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government." *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940).

Though often challenged, this Court has never disturbed the foundation of the freedoms of speech and press guaranteed by the First Amendment:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters

55. *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943).

56. *Herndon* v. *Lowry*, 301 U.S. at 258.

of public concern without previous restraint or fear of subsequent punishment."[57]

The various efforts to restrict the voice of the press have always been couched in terms of achieving worthy "social goals" which are thought to outweigh purportedly "minor restrictions" upon the freedom of the press.[58] However, this Court has consistently rejected these "balances" in favor of a profound constitutional commitment to a vigorous press providing the necessary information for the exigencies of our time.

This Court has invalidated efforts by the States to restrict the freedoms of speech and press in the name of fair elections, *Mills* v. *Alabama*, 384 U.S. 214 (1966); for the protection of personal reputation, *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); in the interests of community morality, *Winters* v. *New York*, 333 U.S. 507 (1948); to combat racial discrimination in housing, *Organization for A Better Austin* v. *Keefe*, 402 U.S. 415 (1971); and to protect national security, *New York Times Company* v. *United States*, 403 U.S. 713 (1971), to mention just a few. Additionally, this Court has also noted that truthful discussions of matters of public interest are protected from state interference. *Garrison* v. *Louisiana*, 379 U.S. 64 (1964).

> "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Garrison* v. *Louisiana*, 379 U.S. at 74.

The majority decision of the Georgia Supreme Court ignores this Court's consistent recognition and commitment to the preservation of First Amendment freedoms and totally fails to acknowledge that GA. CODE ANN. § 26-9901 abridges the freedom of press and speech mandated by the First Amendment and delineated by this Court.

57. *Thornhill* v. *Alabama*, 310 U.S. at 101.

58. As noted in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973), "There is never a paucity of arguments in favor of limiting the freedom of the press." (Mr. Justice Stewart, concurring).

By its terms GA. CODE ANN. § 26-9901 applies only to the media of public dissemination. The unmistakable purpose of this legislation is to regulate the content of the news media. The statute prohibits "public dissemination" of the victim's name by the news media, but significantly, it does not prohibit the private discussion of the incident or the victim's name between individuals, nor does it prevent the girl's name from becoming a part of the public record, e.g., listed in an indictment or mentioned in open court.

This statute does not restrict the right of individuals to discuss the name of the victim. No such restriction is imposed on the victim, her parents, the defendants, the state prosecutor, the grand jury, the victim's friends and neighbors, the witnesses to the incident, or even persons of idle curiosity who seek to inform themselves about all the facts and circumstances surrounding the incident. This statute is directed *exclusively* at the exercise of those same rights by the news media.

Aside from the Supreme Court of Georgia's "finding" that GA. CODE ANN. § 26-9901 stems from a legislative determination that the publication of the name of a rape victim is not a matter of public interest or general concern in the State of Georgia, evidence in support of this position is minimal. Indeed, the statute itself and the arguments advanced in its support suggest that the law was passed to protect the rape victim from the intense public

interest which in fact surrounds the crime and those involved in the crime.[59]

In the case upon which both the plaintiff and the Supreme Court of Georgia have relied, *Wisconsin* v. *Evjue*, 253 Wis. 146, 33 N.W.2d 305 (1948), the court concluded that the statute was intended to save from embarrassment and offensive publicity women who have been the subject of the kind of assault delineated in the statute and was further intended to aid law enforcement officers to more readily obtain evidence for the prosecution of such criminal offenses. 33 N.W.2d at 309. The court realized that publication of the victim's name could in some circumstances be a matter of interest to the public, although the court describes such interest as "a morbid desire to connect the details of one of the most detestable crimes known to the law with the identity of the victim."[60]

Because of its apparently erroneous belief that twenty states had enacted similar laws, the Wisconsin court appears to have been strengthened in its resolve that the statute, though an infringement of freedom of press, serves justifiable ends.

> "It was to prevent this [personal suffering and embarrassment] and aid prosecuting officers that the legislature of this and 19 other states have enacted laws of this general character."

59. The Georgia statute was first passed in 1911. Statutes 1911, p. 179, GEORGIA CRIMINAL CODE ANN. § 343 (1914). The statute was recodified as GA. CODE ANN. § 26-2105 (1953). In 1968 the present version of the statute was enacted expanding the prohibitions to include the broadcast media.

The one authority in examining the available evidence suggests that the motivation for the statute was gallantry, perhaps combined with racial overtones. Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions On Reporting of Fact*, 16 STAN. L. REV. 107, 128 (1963).

60. 33 N.W.2d at 312.

This statement is made without citation of any authority. Our research fails to reveal that any states other than Florida, South Carolina, Georgia, and Wisconsin have ever enacted any statutes even remotely similar to that in question.[61] One scholar has conducted an examination of the briefs filed in *Evjue* and reports that no compilation of such statutes was provided to the Supreme Court of Wisconsin or has otherwise been uncovered.[62]

In other reported cases which deal with a news report of the identity of a victim of a sexual offense, the courts have concluded that the identity of the victim or her family was newsworthy and a matter of public interest and have accordingly denied recovery. For example, in *Wagner* v. *Fawcett Publications, Inc.*[63] the Seventh Circuit, after withdrawing its first opinion, concluded that the publication of news stories concerning the rape-murder of the plaintiff's daughter two months after the crime was not actionable as an invasion of privacy because the report was newsworthy.[64] The plaintiff claimed an invasion of privacy because of the defendant's publication of her daughter's name and picture in stories purporting to tell of the killing of her daughter. The trial court dismissed the complaint. In its first opinion the Court of Appeals reversed the dismissal on the grounds that the trier of fact could find that the defendant published the article months after the girl's death had ceased to be news.

On rehearing, however, it was brought to the court's attention that the criminal proceedings surrounding those

61. See 1911 FLORIDA LAWS, c. 6226, § 1, 1952 SOUTH CAROLINA CODE § 16-81 (1952), 1955 WISCONSIN LAWS § 942.02.

62. Franklin, *supra* at 107.

63. No. 13541 (7th Cir. June 18, 1972) *reversed on rehearing*, 307 F.2d 409 (7th Cir. 1962), *cert. denied*, 372 U.S. 909 (1963). The first opinion was withdrawn and was not published.

64. *Id.*

accused of the crime against the plaintiff's daughter *were taking place at the time of the publication.* The court then belatedly concluded that the facts established that when the defendant published the article, his subject matter related to current news. Thus under Illinois law the court affirmed the dismissal of the complaint.[65]

In *Hubbard* v. *Journal Publishing Company*, 69 N.M. 473, 368 P.2d 147 (1962), the plaintiff brought suit against the publisher of a newspaper article for invasion of her privacy, alleging that she had, in effect, been identified as the victim of the sexual assault and that she had suffered extreme humiliation and mental distress.[66] The Supreme Court of New Mexico affirmed a summary judgment for the defendant on three grounds: (1) Since the facts were of public record, the newspaper was privileged to print the stories; (2) The article was accurate and newsworthy; and (3) Although the plaintiff was an involuntary participant in the matter, she fell within the group of persons who may be examined before the pubic eye and have their misfortunes broadcast to the world.[67]

Indeed, the breadth of "facts" which have been held worthy of publication is so broad as to conclusively show that, absent the statute in the present case, the publication of the name of a rape victim in connection with the news

65. 307 F.2d at 412. For discussion of this case see, *The Right of Privacy: Normative—Descriptive Confusion of Newsworthiness*, 30 U.CH.L.REV. 722, 726 (1963).

66. The article appeared in the *Albuquerque Journal* in July, 1960: "Richard Hubbard, 16, son of Mrs. Ann Hubbard, 532 Ponderosa NW, was charged with running away from home, also prior to date, he several times endangered the physical and moral health of himself and others by sexually assaulting his younger sister. The court ordered a suspended sentence to the New Mexico Boys' Home on the condition he serve sixty days in the Juvenile Detention Hall." 69 N.M. at 474, 368 P.2d at 147.

67. 69 N.M. at 475, 368 P.2d at 148-149.

coverage of the trial of those accused of the crime was "newsworthy" and of public interest.[68]

The decisions of this Court in the First Amendment area have established that whether a subject is a matter of "public interest" is an issue to be determined by the Court. In *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), wherein this Court first applied the constitutional privilege for an action for invasion of privacy this Court found *as a matter of law* that:

> "the subject of the Life article, the opening of a new play linked to an actual incident, is a matter of public interest." 385 U.S. at 388.

Similarly in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), the Court indicated that the determination as to whether a matter is of "public interest" is a matter of law and noted that "First Amendment questions of 'constitutional fact' compel . . . *de novo* review (on appeal)."[69]

> "We think the time has come forthrightly to announce that the determinant whether the First Amendment

68. Among the events which have been found worthy of publication are: a woman's conduct during the murder of her husband on the street, *Jones* v. *Herald Post*, 230 Ky. 227, 18 S.W.2d 972 (1929); plump women reducing in a gym with humorous apparatus, *Sweenek* v. *Pathe News, Inc.*, 16 F.Supp. 746 (E.D. N.Y. 1936); performance of the Indian rope trick, *Lahiri* v. *Daily Mirror Inc.*, 162 Misc. 776, 295 N.Y.S. 382 (Sup. Ct. 1937); public suicide, *Metter* v. *Los Angeles Examiner*, 35 Cal. App.2d 304, 95 P.2d 491 (1939); dissuasion from public suicide, *Samuel* v. *Curtis Publishing Company*, 122 F.Supp. 327 (N.D. Cal. 1954); a gambling raid in which the plaintiff was an innocent bystander, *Themo* v. *New England Newspaper Publishing Company*, 306 Mass. 54, 27 N.E.2d 753 (1940); *Jacova* v. *Southern Radio and Television Company*, 83 So.2d 34 (Fla. 1955); Cf. *Schnabel* v. *Meredith*, 378 Pa. 609, 107 A.2d 860 (1954); police treatment of a prisoner, *Hull* v. *Curtis Publishing Company*, 182 Pa. Super. 86, 125 A.2d 644 (1956); the appearance of a murder victim, *Waters* v. *Fleetwood*, 212 Ga. 161, 91 S.E.2d 344 (1956); the appearance of a murder victim's family, *Jenkins* v. *Dell Publishing Company, Inc.*, 251 F.2d 447 (3rd Cir. 1958); the birth of a child to a 12 year old girl, *Meetze* v. *Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1956).

69. *Rosenbloom* v. *Metromedia*, 403 U.S. at 54.

applies to state libel actions is whether the utterance involved concerns an issue of public or general concern, albeit leaving the delineation of the reach of that term to future cases." 403 U.S. at 44-45.

This result is consistent with the Court's initial determination in *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966) that questions of privilege are matters of law.[70]

> "We remark only that, as in the case with questions of privilege generally, it is for the trial judge in the first instance to determine whether the proofs show respondent to be a 'public official.'" 383 U.S. at 88.

The decisions which have addressed the issue of the nature and definition of a newsworthy event further support appellants' contentions in this regard. For instance, the court in *Associated Press* v. *International News Service*, 245 F. 244, 248 (2nd Cir. 1917), *aff'd*, 248 U.S. 215 (1918), declared that newsworthy matters are those which have "that indefinable quality of interest, which attracts

70. Public interest has consistently been found by Federal Circuit Courts as a matter of law. *United Medical Laboratories, Inc.* v. *Columbia Broadcasting System, Inc.*, 404 F.2d 706 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969); *Cerrito* v. *Time, Inc.*, 302 F.Supp. 1071 (N.D. Cal. 1969), *aff'd*, 449 F.2d 306 (9th Cir. 1971); *Firestone* v. *Time, Inc.*, 460 F.2d 712 (5th Cir. 1972), *cert. denied*, 409 U.S. 875 (1972); *Time, Inc.* v. *McLaney*, 406 F.2d 565 (5th Cir. 1969), *cert. denied*, 395 U.S. 922 (1969); *Bon Air Hotel, Inc.*, v. *Time, Inc.*, 295 F.Supp. 704 (S.D. Ga. 1969), *aff'd*, 426 F.2d 858 (5th Cir. 1970); *Ragano* v. *Time, Inc.*, 302 F.Supp. 1005 (M.D. Fla. 1969), *aff'd*, 427 F.2d 219 (5th Cir. 1970); *Time, Inc.* v. *Johnston*, 448 F.2d 378 (4th Cir. 1971); *Wasserman* v. *Time, Inc.*, 424 F.2d 920 (D.C. Cir. 1970); *Medina* v. *Time, Inc.*, 319 F.Supp. 398 (D. Mass. 1970), *aff'd*, 439 F.2d 1129 (1st Cir. 1971); *Cervantes* v. *Time, Inc.*, 330 F.Supp. 936 (E.D. Mo. 1971), *aff'd*, 464 F.2d 986 (8th Cir. 1972).

Federal District Court decisions are in accord. *Goldman* v. *Time, Inc.*, 336 F.Supp. 133 (N.D. Calif. 1971); *Sellers* v. *Time, Inc.*, 299 F.Supp. 582 (E.D. Pa. 1969), *aff'd*, 423 F.2d 887 (3rd Cir. 1970), *cert. denied*, 400 U.S. 830 (1970); *Hensley* v. *Life Magazine, Time, Inc.*, 336 F.Supp. 50 (N.D. Cal. 1971); *Blanke* v. *Time, Inc.*, 308 F.Supp. 378 (E.D. La. 1970); *Konigsberg* v. *Time, Inc.*, 312 F.Supp. 848 (S.D. N.Y. 1970); and *Spern* v. *Time, Inc.*, 324 F.Supp. 1201 (W.D. Pa. 1971).

public attention." The court in *Jenkins* v. *News Syndicate* 128 Misc. 284, 285, 219 N.Y.S. 196, 198 (1926), defined news as "a report of recent occurrences." And in *Sidis* v. *F-R Publishing Corporation*, 113 F.2d 806, 809 (2nd Cir. 1940), the court stated:

> "Regretably or not, the misfortunes and frailties of neighbors . . . are subjects of considerable interest and discussion open to the rest of the population."

The fact that an otherwise private person becomes an unwilling actor in an event of public interest in no way lessens the degree of public interest in that individual's role in the newsworthy event. In *Rosenbloom* v. *Metromedia*, 403 U.S. at 43 (1971), this Court declared:

> "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved."

See also *Cerrito* v. *Time, Inc.*, 449 F.2d 306 (9th Cir. 1971); *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F.2d 858, 861 (5th Cir. 1970); *United Medical Laboratories, Inc.* v. *Columbia Broadcasting System, Inc.*, 404 F.2d 706, 710-11 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969); *Konigsberg* v. *Time, Inc.*, 312 F.Supp. 848, 851 (S.D. N.Y. 1970).

Judged by these standards, the name of the victim of a rape or an attempted rape can be, and often is, clearly a matter of public interest and concern. This is true particularly where the name is a matter of public record, for example, where criminal charges proceed against those accused of a crime, and the name of the victim is used to identify the crime.[71] Additionally, the name of the rape

71. The publication of reports of judicial proceedings has been recognized to be of public interest by the legislature through the enactment of a statutory privilege for fair and accurate reports of proceedings of legislative or judicial bodies. GA. CODE ANN. § 105-709(4).

victim is of public interest in that it may aid in identifying and securing witnesses to the crime.[72] The name may also identify a particular crime so that the public can be informed that the criminal processes are going forward in that instance without any improper interference.

Thus the appellants respectfully submit that GA. CODE ANN. § 26-9901 represents an effort to regulate the truthful publication of information concerning a matter of public interest, i.e., the identity of the victim of a crime, and thereby abridges the freedom of press and speech guaranteed by the First and Fourteenth Amendments. Consequently, the said statute is unconstitutional and without force of law.

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72. As noted by Professor Franklin in a law review article on this subject, the defendants are entitled to such assistance in forming their defense: "It is necessary to turn to the interest of a third party who often enters the picture—the accused rapist who might argue that such a statute is a hindrance to the conduct of his defense. For example, his defense may be consent, supported by testimony of others in the community as to complainant's chastity and her reputation for veracity. If the defendant and complainant are members of the same social group this may not be difficult, but if defendant is a stranger to the area or to complainant's social environment, her identification would be helpful in finding others who might come forward and testify to her poor reputation for morality or veracity. This might also apply to witnesses who saw the complainant shortly after the alleged attack and can testify to her apparent calm and unruffled manner. Although gathering witnesses is a job for the defense, every impediment to the accused in the preparation of his defense is contrary to our notions of a fair trial. These arguments might also be raised by the press. . . . Even if constitutional when no trial is held, identity restrictions should fall when the victim testifies in a public trial. *When a major criminal trial is held a witness's identity may be vital for full understanding of the proceedings and outcome. The full glare of publicity may also serve to expose false claims by the alleged victim. The newspaper's functions of providing information of major public events such as trials and its close relationship to the fair administration of justice are both vindicated by allowing the press, as well as the defendant, to make this contention*" (emphasis added). See Franklin, *A Constitutional Problem In Privacy Protection: Legal Inhibitions on Reporting of Fact*, 16 STAN. L. REV. 107, 137 (1963).

B.

Ga. Code Ann. § 26-9901 Prohibiting the Publication of the Name of a Victim of a Rape Is Unconstitutionally Overbroad in Violation of the First and Fourteenth Amendments to the Constitution of the United States.

GA. CODE ANN. § 26-9901 prohibits the publication by the news media of the name or identity of the victim of a rape or an attempted rape *in all circumstances*, regardless of whether or not the publication of the name may be or is a matter of legitimate public interest and concern. Thus, the statute includes within its broad prohibitions truthful publications concerning public officials, public figures, and matters of public interest which the Court has held to be protected by the First and Fourteenth Amendments to the Constitution. *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964); *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Rosenbloom* v. *Metromedia*, 403 U.S. 29 (1971). Accordingly, the statute is constitutionally overbroad on its face and in its application.

This Court has utilized the overbreadth doctrine most frequently to void state regulations of the First Amendment activites which seek to further a proper governmental purpose but which on their face or in their applications sweep unnecessarily broadly and thereby invade the area of protected freedoms. See *NAACP* v. *Alabama*, 377 U.S. 288 (1964); *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Zwickler* v. *Koota*, 389 U.S. 241 (1967); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964); *Stanley* v. *Georgia*, 394 U.S. 557 (1969). Additionally, this Court has not hesitated to apply this principle in order to protect other constitutional freedoms from overly broad state encroachment. See

NAACP v. *Button*, 371 U.S. 415 (1963) (freedom of association); *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964) (freedom of travel); and *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967) (academic freedom). See also *Lovell* v. *Griffin*, 303 U.S. 444 (1938); *Schneider* v. *State*, 308 U.S. 147 (1939); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966); *NAACP* v. *Alabama*, 377 U.S. 288 (1964). Thus it is clearly established that a statute that is overly broad in its proscriptive sphere and invades protected freedoms, especially First Amendment freedoms as in the case at bar, is constitutionally invalid and unenforceable.

The unlawful overbreadth of GA. CODE ANN. § 26-9901 is easily shown by the statute's flat prohibition under all circumstances of the publication by the news media of the name of the victim of a rape or an attempted rape. The statute:

1. prohibits the news media from publishing the name or identity of the victim of a rape or an attempted rape without regard to whether or not the publication of the name is or might be a matter of legitimate public interest and concern; and

2. prohibits *all* publications without regard to truth, reasonableness, newsworthiness of the event or person, public interest, or timeliness. For example, this statute, as construed by the Supreme Court of Georgia, applies not only to the publication of the name or identity of the victim of a rape or an attempted rape upon whom another felonious crime may have been perpetrated or who may otherwise be a matter of legitimate public interest and concern.

The statute *goes far beyond* what might be arguably justified in the exercise of the state's legitimate authority to protect its vital interests. The broad reach of the statute outstrips the rationale which might support its narrow application in those circumstances where it might be shown that no matter of public interest was involved.

Thus, such broad prohibition clearly sweeps within the protected area of the First and Fourteenth Amendments to the Constitution of the United States and thereby renders the GA. CODE ANN. § 26-9901 unconstitutional.

C.

The Georgia Supreme Court Erroneously Determined That the Georgia General Assembly Can Regulate the Content of News Publication by Legislatively Declaring Certain Facts Not of Public Interest and Concern.

Another alarming and erroneous determination by the Georgia Supreme Court in the case at bar is the majority's conclusion that "the General Assembly of Georgia had a perfect right to declare that the victim of [a rape or an attempted rape] should not be publicly identified by the news media" and that "because of this statute the disclosure of the identity of the victim of such a crime is not a matter of public interest and general concern in this state."[73]

This conclusion is premised upon the majority's belief that the state legislature has the power to determine what facts are not a matter of public interest and concern and to thereby withdraw the constitutional protection afforded the truthful publication of matters which are, in fact, clearly matters of public interest. The Georgia Court, without citation or discussion of a single decision of this

73. Appendix to Jurisdictional Statement, A-24-26.

Court, supports this conclusion with the bare assertion that the First Amendment is not absolute.[74]

With all due respect, the appellants submit that the reasoning of the Georgia Supreme Court is in error and its reliance on the rejection of "absolutism" under the First Amendment is misplaced. There is no issue here as to whether or not the First Amendment is "absolute." This Court has confined state regulation in the First Amendment field to an exceptionally narrow and limited area. See *Herndon* v. *Lowry*, 301 U.S. 242 (1937); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940). The issue is whether the Georgia Supreme Court erred in holding that the State legislature is empowered to unilaterally determine what publications are not entitled to constitutional protection by legislatively deciding what matters it feels are not of "publice interest and concern."

Under the decision of the Supreme Court of Georgia in the instant action, the legislature in Georgia is free to determine which other "facts" are not, in the judgment of the legislature, sufficiently of "public interest" to merit publication and to prohibit the news media from publishing such "facts." Such a determination need not be influenced by considerations of whether or not the "fact" is true or of the particular circumstances surrounding the event; of whether the "fact" was a matter of current public debate; of whether the "fact" is incorporated in a news story which is fair and accurate; of whether the "fact" is a matter of public record and available to any interested person. All the legislature need determine is that, in their judgment, the publication of this "fact" is not a matter of public interest and general concern.

74. "However, despite the late Mr. Justice Black's absolutist position with regard to the First Amendment, we know that his position has never been adopted by the Supreme Court of the United States" (Appendix to Jurisdictional Statement, A-18).

Vesting such authority in the Georgia legislature is directly contrary to the express limitations on governmental power contained in the First Amendment guarantees of freedom of speech and press. By its terms the First Amendment seeks to prevent the legislative branch of government from enacting laws which abridge freedom of speech and press. If the Georgia legislature does indeed possess the "perfect right" or power to define the areas of "public interest" in news publications then constitutional limitations of the First Amendment have been abridged and, indeed, eliminated. The power to legislatively determine and define newsworthiness, even by a majority vote, will subject the public to a press which is limited to the publication of "approved" facts. Such a power is perhaps the most direct, notorious and open abridgment of the First Amendment imaginable.

Additionally, such a broad legislative mandate harbors foreboding implications. As first and moderate methods to attain a "responsible press" which publishes information "in the public interest" prove unsatisfactory to the government, those bent on achieving a "responsible press" must apply measures of ever increasing severity. A government empowered to *prohibit* the publication of matters which are not "in the public interest" needs no new or additional power to *require* the publication of matters determined to be in the public interest.[75]

An acknowledgment of the power in government to regulate the content of the news media invites its use. As governmental pressure towards a "responsible press" grows and the news media is forced to refrain from publishing matters other than those which are "in the public interest," the strife will become more bitter as to whose "public interest" it shall be.

75. See, *Miami Herald Publishing Company* v. *Tornillo*, ____ U.S. ____ (73-797, argued April 17, 1974).

> "It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority." *West Virginia State Board of Education* v. *Barnette*, 319 U.S. at 641.

By reason of the foregoing, we respectfully submit that GA. CODE ANN. § 26-9901, as construed by the Supreme Court of Georgia rests upon the assertion of a power constitutionally forbidden the legislature and must be declared unconstitutional as an abridgment of the freedom of the press.

D.

The Georgia Supreme Court Erred in Holding That Plaintiff's Privacy Action Is Not Barred by the Defendants' Freedoms of Speech and Press under the First and Fourteenth Amendments to the Constitution of the United States.

Appellants respectfully submit that the Georgia Supreme Court's holding that they may be subject to civil liability under an invasion of privacy theory for their publication of a newsworthy fact in a timely news story concerning a matter of public interest is constitutionally unsupportable. The Georgia Court's rationale and decisions are wholly unsupported by and directly contrary to the principles established by this Court in a clear line of controlling decisions. See *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971). Specifically, the Georgia Supreme Court erroneously concluded that it was proper for it to engage in an *ad hoc* balancing of interests, a weighing of the conflicting societal values in order to determine whether the particular speech in issue is protected by the First Amendment. The Georgia Court in this case resolved the "head-on" collision between the First Amendment and the right of privacy by finding that because of GA. CODE ANN. § 26-9901 the publication was not a matter of public interest and thus liability could be imposed if the jury found the publication in question to be "highly offensive" to a reasonable man.[76]

Aside from the Georgia Court's decision on the constitutionality of the statute, the Court's decision reflects three additional fundamental errors in failing to recognize that:

> (1) No civil cause of action (whether for libel or invasion of privacy) can be constitutionally maintained as a consequence of the truthful publication of facts concerning a matter of public interest.[77] Neither the legislature nor the courts are constitutionally free to balance on an *ad hoc* basis the "conflicting societal values" so as to justify the imposition of civil or criminal sanctions upon truthful publications of public interest.[78]

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76. The Georgia Supreme Court remanded the entire case to the trial court for a determination of both liability and, if necessary, damages on the following standard: "And in formulating such an issue for determination by the fact-finder, it is reasonable to require the Appellee to prove that the Appellants invaded his privacy *with wilful or negligent disregard for the fact that reasonable men would find the invasion highly offensive.*" Appendix to Jurisdictional Statement, A-17 (emphasis added).

77. *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *Curtis Publishing Company* v. *Butts*, 388 U.S. 130 (1967); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971); *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971).

78. *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Kois* v. *Wisconsin*, 408 U.S. 229 (1972).

(2) The publication of the name of this deceased victim of an alleged murder-rape was constitutionally protected as a matter of public record.

(3) The publication of the name of this deceased victim of an alleged murder-rape was constitutionally protected as a relevant fact rationally related to the discussion and report of a matter of public interest.

1.

The Constitutional Freedoms of Speech and Press Preclude an Action for Invasion of Privacy for the Publication of Facts Concerning a Matter of Public Interest.

Though often challenged, the principle enunciated by this Court which has emerged as the contemporary foundation of the freedoms of speech and press has been that the press is free to truthfully discuss and publish all matters relating to public officials, public figures, and *public interest* and without previous restraint or fear of subsequent punishment. *Thornhill* v. *Alabama*, 310 U.S. 88, 101-103 (1940); *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Curtis Publishing Company* v. *Butts*, 388 U.S. 130 (1967); *Rosenbloom* v. *Metromedia*, 403 U.S. 29 (1971); *Kois* v. *Wisconsin*, 408 U.S. 229, 230 (1972).[79]

79. In framing this constitutional principle, the Court has endeavored to define "areas" of constitutionally protected speech instead of balancing. Prior to this Court's decision in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), this Court considered it appropriate to engage in an *ad hoc* balancing of interest in each case in order to resolve First Amendment disputes. See *American Communications Association* v. *Douds*, 339 U.S. 382 (1950); *Dennis* v. *United States*, 341 U.S. 494, 524-25 (1951) (Mr. Justice Frankfurter concurring); and *Barenblatt* v. *United States*, 360 U.S. 109 (1959); *NAACP* v. *Alabama*, 357 U.S. 449, 463, 464 (1958); *Konigsberg* v. *State Bar of California*, 366 U.S. 36, 51 (1961). Such was the procedure followed by the majority of the Georgia Supreme Court in this case.

Georgia courts have long recognized the privilege to publish matters relating to subjects of public interest. In *Waters* v. *Fleetwood*, 212 Ga. at 167, 91 S.E.2d 344 (1956), the Supreme Court of Georgia denied recovery to the parents of a girl whose murdered body had been photographed and published by the defendant. The court observed:

> "There are many instances of grief and human suffering which the law can not redress. The present case is one of those instances. *Through no fault of petitioner or her deceased child, they became the objects of widespread public interest.* The murder of the petitioner's daughter necessarily became a *matter of legal investigation* and the *subject matter of public records.* During the pendency and continuation of the investigation, and until such time as the perpetrator of the crime may be apprehended and brought to justice under the rules of our society, *the matter will continue to be one of public interest*, and *the dissemination of information pertaining thereto would not amount to a violation of the petitioner's right of privacy*" (emphasis added). *Supra* at 167.

In *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), this Court expressly held:

> "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." 379 U.S. at 74.

Beginning with *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), however, and since consistently followed by this Court in *Butts*, *Hill*, and *Rosenbloom*, this Court has rejected the "balancing" test and has resolved First Amendment issues by delimiting areas of constitutionally protected speech, rather than endeavoring in each case to balance the various societal interests. This new approach was predicated upon the conviction that the news media under the balancing rationale was confronted with broadcast uncertainty resulting in self-censorship.

This Court has made it abundantly clear that the freedoms of speech and of press protect publications of matters of public interest from actions for invasion of privacy as well as for libel. *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967). In that case, plaintiff sued for an invasion of privacy based on the publication of the story which falsely reported that the Broadway play *The Desperate Hours* reflected the ordeal of the plaintiff's family at the hands of a group of escaped convicts. Setting aside a judgment for the plaintiff, the Court held that the constitutional privilege which applies to publications in libel actions applies with equal force in an action for invasion of privacy.

> "We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth."[80]

Since *Time, Inc.* v. *Hill* was decided, Federal courts have unanimously recognized that *truth* is a complete constitutional defense to all actions for invasion of privacy based upon news reports discussing events of public interest.[81]

Moreover, it is important to note that the fact that an otherwise private person becomes an unwilling actor

80. *Time, Inc.* v. *Hill*, 385 U.S. 387, at 388.

81. See, e.g., *Goldman* v. *Time, Inc.*, 336 F.Supp. 133 (N.D. Cal. 1971), publication of an article about young Americans wandering through Europe; *Cullen* v. *Grove Press, Inc.*, 276 F.Supp. 727 (S.D. N.Y. 1967), injunction denied to prevent distribution of film portraying conditions in public mental institutions; *DeSalvo* v. *Twentieth Century-Fox Film Corporation*, 300 F.Supp. 742 (D. Mass. 1969), injunction denied to prevent release of motion picture *The Boston Strangler*; *Cantrell* v. *Forest City Publishing Company*, ... F.2d ..... (6th Cir. 1973), judgment for invasion of privacy reversed where publication concerning the effect upon the widow and child of an individual who lost his life when a bridge across the Ohio River collapsed.

in an event of public interest, as in the present case, in no way lessens the degree of public interest and the individual's role in the newsworthy event. *Rosenbloom* v. *Metromedia*, 403 U.S. 29, 43 (1971); *Cerrito* v. *Time, Inc.*, 449 F.2d 306 (9th Cir. 1971); *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F.2d 858, 861 (5th Cir. 1970); *United Medical Laboratories, Inc.* v. *Columbia Broadcasting System, Inc.*, 404 F.2d 706, 710, 711 (9th Cir. 1968).

> "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view *both private citizens and public officials*. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. *The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.* 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940)" (emphasis added) *Time, Inc.* v. *Hill*, 385 U.S. at 388.

Closely related to this constitutional privilege has been the recognition that the right of privacy does not extend to discussions which concern or affect matters of public interest. Such is clearly revealed from a brief analysis of the development of the right of privacy.

The concept of a "right of privacy" has its genesis in an 1890 Law Review article written by Brandeis and an associate.[82] The concept arose from the fundamental de-

82. Warren and Brandeis, *The Right of Privacy*, 4 HARV. LAW REVIEW 193 (1890).

sire of the individual "to be let alone."[83] The Georgia Supreme Court was one of the first judicial bodies to officially recognize this right, *Pavesich* v. *New England Life Insurance Company*, 122 Ga. 190, 50 S.E. 8 (1905). The right of privacy has now been recognized in at least twenty-seven (27) jurisdictions.[84] Although the scope of the right has been variously defined,[85] it is remarkable that *without exception* the authorities and the commentators note that the freedoms of speech and of the press limit the right of privacy. For example,

> *"The right of privacy does not prohibit any publication of matter which is of public or general interest."*[86]

In recognizing the right to privacy and the civil actions for its invasion, the Supreme Court of Georgia noted:

> *"It will therefore be seen that the right of privacy must in some particulars yield to the right of speech and of the press. . . . The truth may be spoken, written, or printed about all matters of a public nature, as well as matters of a private nature in which the public has a legitimate interest.* The truth may be uttered and printed in reference to the life, character, and conduct of individuals whenever it is necessary

83. COOLEY, TORTS, 29 (2nd Ed. 1888).

84. For a discussion of those jurisdictions recognizing this right, see Prosser, *Privacy*, 48 CAL. L. REV. 383, 386-87 (1960).

85. Dean Prosser describes the "right" in terms of four related torts:

> "(1) Intrusion upon the plaintiff's seclusion or solitude or into his private affairs.
>
> (2) Public disclosure of embarrassing private facts about the plaintiff.
>
> (3) Publicity which places the plaintiff in a false light in the public eye.
>
> (4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness." *Id.* at 389.

86. Warren and Brandeis, *supra*, p. 214.

> to the full exercise of the right to express one's sentiments on any and all subjects that may be proper matter for discussion" (emphasis added). *Pavesich* v. *New England Life Insurance Company*, 122 Ga. 190, 204, 50 S.E.2d 68, 71, 72 (1905).

In his distinguished study, *Government and Mass Communications*, Professor Chafee[87] disapproved of the New York statute which provided a civil cause of action for invasion of privacy coming from the unauthorized use of one's photograph.[88] Professor Chafee admitted that although he was not concerned with the unauthorized use of pictures in advertising, the impact of the privacy on documentary films could be significant.[89] Chafee recommended

> "that respect for privacy be left to public opinion and the conscience of owners and editors." Chafee, *supra*, 138.

In *Brisco* v. *Reader's Digest Association, Inc.*, 93 Cal. Rptr. 866, 483 P.2d 34 (1971), cited by the majority of the Georgia Court,[90] the California Supreme Court held that the defendant's publication of the plaintiff's criminal record some eleven years after his conviction created a jury question to determine whether the plaintiff's identity was "newsworthy." *Brisco* did not involve a statutory prohibition, as in the present case, and the court expressly reserved its opinion as to the constitutionality of such statute.[91] The court in *Brisco*, however, explicitly indicated that the right of privacy is subject to the limitations of the right of the free press.

87. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS (1947).

88. NEW YORK CIVIL RIGHTS LAW § 50, 51.

89. Chafee, *supra*, 137.

90. Appendix to Jurisdictional Statement, A-14, 20-21.

91. "We of course express no opinion on these matters." 482 P.2d at 39.

> "There can be no doubt that reports of current criminal activities are the legitimate province of a free press. The circumstances under which crimes occur, the techniques used by those outside the law, the tragedy that may befall the victims—these are vital bits of information for people coping with the exigencies of modern life. Reports of these events may also promote the value served by the constitutional guarantee of a public trial. Although a case is not to be 'tried in the papers,' reports regarding a crime or criminal proceedings may encourage unknown witnesses to come forward with useful testimony and friends or relatives to come to the aid of the victim."[92]

The result in *Brisco* was largely tied to the fact that a majority of the California Court was offended by a publication of the plaintiff's past criminal conduct some eleven years after the fact. In the present case, the report concerned current criminal activities expressly recognized in *Brisco* as the province of a free press.[93] To the extent that *Brisco* indicates that publication of facts of and related to matters of public interest can be constitutionally prohibited because they are "offensive," the case is wrongly decided.[94]

The principle readily distilled from the above-cited authorities and cases is that the First Amendment to the Constitution protects all truthful publications involving matters relating to public officials, public figures, and most importantly for the purposes of the case at bar, matters of and relating to public interest, even as against civil

92. 483 P.2d at 39.

93. *Id.*

94. See *Winters* v. *New York*, 333 U.S. 507 (1948); *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971). See also *Sidis* v. *F-R Publishing Corp.*, 113 F.2d 806 (2nd Cir. 1940); *Smith* v. *Doss*, 37 So.2d 118 (Ala. 1948); *Barbieri* v. *News-Journal Company*, 189 A.2d 773 (Del. 1963).

actions predicated on the right of privacy, as such a right is limited by the First Amendment's freedoms of speech and press, and not vice versa. Since the broadcast here in question was an accurate, factual account concerning matters of substantial public interest, including the publication of the victim's name, as heretofore discussed in detail (pp. 17, 18, 39, 40 of this brief, *supra*), the First Amendment precludes the plaintiff's claims against the defendants for invasion of privacy. Accordingly, this case should have been resolved by a ruling on defendants' Motion for Summary Judgment because the publication was a matter of public interest and within that constitutionally protected area of free speech and press. The Georgia Supreme Court, however, totally disregarded the controlling precedents of this Court and this, appellants contend, was and is reversible error.

2.

The Privilege to Publish All Matters of Public Interest and Concern Embodied in the Constitutional Freedoms of Speech and Press Logically Requires the Further Privilege to Discuss and Accurately Publish Facts Which Appear on Public Records.

Appellants respectfully submit that an essential corollary to the freedom to publish concerning matters of public interest is the right to truthfully discuss and publish facts on the *public record*. *Rosenbloom* v. *Metromedia*, 403 U.S. 29 (1971); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967).[95] Inasmuch as the application of the constitutional "public interest" privilege, although sound and essential to the full meaning and function of the First Amendment, must

95. In this regard, in *Metromedia*, Mr. Justice White also indicated, in a similar vein, the need to afford an absolute privilege to discuss the public acts of public officials without limitations as to the wholly private individuals involved or affected. 403 U.S. at 62.

be finally resolved subsequent to the publication, further refinement of this said privilege that eliminates or minimizes this aspect of the privilege would seem warranted. Otherwise, a certain degree of uncertainty and self-censorship may linger on.

A further definition and refinement of "public interest" in this area would thus seem desirable and justified. The "public record" privilege,[96] herein advocated by appellants, is just such a refinement. Protection of the publication of matters of public record, which already constructively are a matter of public interest and undoubtedly of interest to some segment of the public, would eliminate a portion of the uncertainty and tendency toward self-censorship that still remains today. Furthermore, such a privilege would be administratively feasible as few disputes would arise as to whether a matter was actually on the public records, and such could be determined by the court as a matter of law. The scope of such a "public record" privilege would be no more difficult for the courts to administer than the similar rule in *Sullivan* with respect to public officials.

Additionally, establishment of this "public record" privilege would foster and assure the viability and continued efficacy of the historical responsibility of the press to provide the public with all the information it requires to meet the exigencies of society. This responsibility necessarily includes the freedom of the press to publish and express facts and views that do not necessarily appeal to

96. Georgia law provides for such a privilege with respect to legislative and judicial proceedings; GA. CODE ANN. § 105-704, 709(4): "A fair and honest report of the proceedings of legislative or judicial bodies, or of court proceedings, or a truthful report of information received from any arresting officer or police authorities, shall be deemed a privileged communication; and in any action brought for newspaper libel, the rule of law as to privileged communications shall apply . . . 4. Fair and honest reports of the proceedings of legislative or judicial bodies."

the interest of a majority of the public, but may only appeal to a limited and minority segment thereof. Matters on file in the public record encompass a broad range of topics and facts that are of interest and assistance to many (and perhaps even a few) varied and different individuals or segments of the population. Freedom of the press, if it is to have meaning, must be interpreted to assure dissemination of facts and ideas that may be of interest to only a few individuals or to a small segment of the population. To hold otherwise would be to deny these persons and groups access to, and conversely the news media the right to publish, information of value to them in "meeting the exigencies" of their particular circumstances—a proscription which, in aggregate terms, rises to substantial proportions. The privilege to publish matters of "public record" would go far toward the full dissemination of all factual matters which might aid the public in conducting and meeting the "exigencies" of their lives, even the remotest individual or smallest segment of the general populace.

In addition to the fact that such a "public record" privilege is a necessary corollary of the holdings of this Court [*Rosenbloom* v. *Metromedia*, 403 U.S. 29 (1971); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967)], it has been judicially recognized. For example, in *Hubbard* v. *Journal Publishing Company*, 69 N.M. 473, 368 P.2d 147 (1962), the plaintiff brought suit against the publisher of a newspaper article for invasion of her privacy.[97] The plaintiff alleged that she had, in effect, been identified as the victim of

97. The article appears in the *Albuquerque Journal* in July, 1960: "Richard Hubbard, 16, son of Mrs. Ann Hubbard, 532 Ponderosa NW, was charged with running away from home; also prior to date, he several times endangered the physical and moral health of himself and others by sexually assaulting his younger sister. The court ordered a suspended sentence to the New Mexico Boys' Home on the condition he serve sixty days in the Juvenile Detention Hall." 69 N.M. at 474, 368 P.2d at 147.

a sexual assault and that she had suffered extreme humiliation and mental distress.[98] The Supreme Court of New Mexico affirmed a summary judgment for the defendant on three grounds:

> 1. *Since the facts were of public record, the newspaper was privileged to print the stories*;
>
> 2. The article was accurate and newsworthy; and
>
> 3. Although the plaintiff was an involuntary participant in the matter, she fell within the group of persons who may be examined before the public eye and have their misfortunes broadcast to the world.[99]

This "public record" privilege was also explicitly recognized by the district court in *Frith* v. *Associated Press*, 176 F.Supp. 671 (E.D. S.C. 1959). That case involved the publication of photographs and related news stories of and pertaining to the plaintiffs who had been arrested for a particularly notorious criminal assault on the high school band director in Camden, South Carolina. The photographs had been taken by the South Carolina officials and were distributed to the news media by an assistant of the Governor of South Carolina during the Governor's press conference announcing the said arrest. These said photographs were considered and deemed to be "official records" of the State of South Carolina. In granting the defendants' motions for Judgment on the Pleadings and Summary Judgment, the court explicitly recognized the "public record" privilege and predicated its decision, in part, thereon, having stated in so holding:

98. *Id.* at 474, 368 P.2d at 147.

99. 69 N.M. at 475, 368 P.2d at 148-49.

> "The two primary limitations placed on the right of privacy are *publications of public records* and publications of matters of legitimate or public interest.
>
> *The publication of these pictures in these cases concerned matter of great public interest and was an official record* made public by the Governor of South Carolina, and his highest law enforcement officials" (emphasis added). 176 F.Supp. at 674.

Similar to the above holdings, this Court has indicated that publications of matters of public record cannot violate state libel laws if true[100] and several recognized authorities have noted that such publications cannot invade a "privacy" which has been forfeited to the open scrutiny of the public record.[101]

It is important to further note with regard to the "public record" privilege, inasmuch as the publication in the case at bar relates to a matter contained in the public record of judicial proceedings (the victim's name having been stated in the indictments), that Georgia, in addition to at least twenty-two (22) other states and territories,[102] has established the privilege to publish a "fair and honest report of the proceedings of legislative or judicial bodies, or of court proceedings, or a truthful report of information received

100. *New York Times* v. *Sullivan*, 376 U.S. 254 (1964)

101. Warren and Brandeis, *supra;* Prosser, *supra.*

102. ALA. CODE tit. 14, § 348 (1959); ARIZ. REV. STAT. ANN. § 13-356 (1956); CAL. PENAL CODE § 254 (West 1969); IDAHO CODE § 18-4807 (1948); KY. REV. STAT. ANN. § 411.060 (1963); LA. REV. STAT. ANN. § 14:49 (1951); MICH. STAT. ANN. § 27A.2911 (3) (1962); MINN. STAT. ANN. § 609.765 (4) (1971); MONT. REV. CODES ANN. § 94-2807 (1969); N. J. STAT. ANN. § 2A.43-1 (1952); N. M. STAT. ANN. § 40A-11-1 (F) (1974); N. Y. CIV. RIGHTS LAW § 74 (McKinney 1963); N. D. CENT. CODE § 12-28-10 (1960); OHIO REV. CODE ANN. § 2317.05 (Page 1954); OKLA. STAT. tit. 21, § 777 (1971); P. R. LAWS ANN. tit. 32, § 3144 (1968); TEX. REV. CIV. STAT. art. 5432 (1958); UTAH CODE ANN. § 76-40-6 (1953); V. I. CODE ANN. tit. 14, § 1183 (1964); WASH. REV. CODE ANN. § 9.58.050 (1956); WIS. STAT. ANN. § 895.05 (1965); WYO. STAT. ANN. § 1-876 (1959);

from any attesting officer or police authorities," GA. CODE ANN. § 105-704, 709(4), a privilege essentially predicated on the premise that such matters are of public record and consequently of public interest entitled to protected dissemination to the public. Establishment of the "public record" privilege herein advocated would be in furtherance of, and in complete harmony with, the rationale underlying such statutes.

By reason of the foregoing, appellants respectfully submit that it was error for the Georgia Supreme Court to have overlooked the fact that the name of the rape victim was a matter of public record (it being contained in the indictments) and to have failed to afford the appellants the privilege to truthfully and without actual malice, as appellants did, publish an account of a matter of public record.

3.

The First and Fourteenth Amendments Protect the Factual Publication of Truthful Information Which Is Published As Part of and Is Rationally Related to a Report Concerning a Matter of Public Interest.

Appellants respectfully submit that the privilege to publish matters of public interest protects the truthful publication of information arguably not a matter of public interest standing alone, but which is published as a part of and is rationally related to a report of a discussion concerning a subject matter of public interest.

Thus, the name of a murder-rape victim, when published, as in the instant case, in a truthful account of court proceedings and criminal prosecutions for a particular crime, is rationally related to a matter of public interest and is likewise constitutionally protected pursuant to the rule embodied within the clear rationale of this Court's

opinions in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971); and *Kois* v. *Wisconsin*, 408 U.S. 229 (1972).

In *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), this Court held a rule unconstitutional which compelled the critic of official conduct to guarantee the truth of all of his factual assertions upon pain of a libel judgment. The decision was predicated upon the Court's conviction that such a rule abridged the freedom of the press because of the self-censorship that would necessarily result.

In *Curtis Publishing Company, Inc.* v. *Butts*, 388 U.S. 130 (1967); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); and *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), this Court similarly rejected a rule that compelled the news media to guarantee the truth of all of its factual statements in reports relating to public figures and matters of public interest. The same principles would likewise appear to compel the rejection of a rule that the news media must guarantee that each separate fact published is a matter of "public interest" and newsworthy.

This Court has also made it abundantly clear that the protections of the First Amendment which in publication of matters of public interest shelter the *false fact* (which is not deliberately published) also protects the *relevant fact*[103] and the *rational interpretation* of the facts.[104] In *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265 (1971), this Court rejected the notion that a jury is free to impose civil liability upon one who publishes a fact which the jury does

103. *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265 (1971); *Kois* v. *Wisconsin*, 408 U.S. 229 (1972).

104. *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971).

not feel "relevant" to discussion which is of public interest.

> "A standard of 'relevance' . . . especially such a trandard applied by a jury under the preponderance-of-the-evidence test, is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks,' *New York Times, supra*, at 270 [11 L.Ed.2d at 701], which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail."[105]

In *Kois* v. *Wisconsin*[106] this Court held that nude photographs were constitutionally protected where their publication was *rationally related* to an article which was entitled to constitutional protection.[107] In *Kois*, this Court reiterated the language of *Thornhill* v. *Alabama*:[108]

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully *all matters of public concern* without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need *for information and education with respect to the significant issues of the time* (Court's emphasis)."[109]

105. 401 U.S. at 276-277.
106. 408 U.S. 229 (1972).
107. 408 U.S. at 231.
108. 310 U.S. 88, 101-102 (1940).
109. 408 U.S. at 230.

In *Time, Inc.* v. *Pape*,[110] this Court held that a publication's choice of one of several "rational interpretations" was not sufficient to create a jury question on the issue of malice.[111]

Predicated on this same rationale, this Court has also stated and held in numerous decisions that the fact that an otherwise private person becomes an unwilling actor in an event of public interest in no way lessens the degree of public interest in the event and the individual's role in the newsworthy event. *Rosenbloom* v. *Metromedia*, 403 U.S. 29, 43 (1971); *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967).[112] Implicit in these decisions is the premise that the publication of facts, including the identity of the unwilling participants, rationally related to the subject matter of the report of public interest is constitutionally protected under the rulings of this Court following *N.Y. Times* v. *Sullivan*, 376 U.S. 254 (1964), and *Garrison* v. *Louisiana*, 379 U.S. 64 (1964).[113]

Such prior precedents of this Honorable Court appear to now require explicit articulation of the privilege for the publication of facts which are a part of and are rationally related to a report concerning a subject matter of public interest.

110. 401 U.S. 279 (1971).
111. 401 U.S. at 290.
112. Numerous Circuit Court of Appeals have also recognized and applied this principle. *Cerrito* v. *Time, Inc.*, 449 F.2d 306 (9th Cir. 1971); *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F.2d 858, 861 (5th Cir. 1970); *United Medical Laboratories, Inc.* v. *Columbia Broadcasting System, Inc.*, 404 F.2d 706, 710-11 (9th Cir. 1968).
113. A number of federal district courts have, in effect, applied a similar rationale keyed to the reasonableness of the relationship between the general subject matter and the reference or depiction of the plaintiff—denying relief where such a reasonable relationship is shown. *See Kent* v. *Pittsburgh Press Co.*, 349 F.Supp. 622, 627 (W.D. Pa. 1972); *Man* v. *Warner Bros., Inc.*, 317 F.Supp. 50, 52 (S.D. N.Y. 1970); *Goldman* v. *Time, Inc.*, 336 F.Supp. 133, 137-138 (N.D. Cal. 1971).

Under the allegedly erroneous "highly offensive" standard enunciated by the Supreme Court of Georgia in this case,[114] appellants are compelled to speculate at their peril whether or not a jury would ultimately decide that some facts in a story may not relate to a matter of public interest or might have been written with less harm to some particular plaintiff.[115] Such a situation would certainly have a "chilling effect" upon a publisher or broadcaster precipitating an extremely overly-cautious approach in the selection or editing of news stories which might possibly be said to offend *any* possible member of the audience.

The rule enunciated by the Supreme Court of Georgia, if permitted to stand, represents substantial incursion into the "breathing space"[116] which the First Amendment requires to survive. A publisher's efforts to ascertain that a report is true, fair, and impartial will not diminish his risk of civil damages for alleged invasions of privacy. The gist of the action is not inaccuracy of information, but rather a judgment that the defendant entered an area that a jury thinks he should not have entered in the way he did. A broadcaster cannot be sure of safety unless he resolves to stay out of *any* borderline area. Such a wariness could be seriously detrimental to the public's interest in the free flow of information and to the values embodied in the First Amendment guarantees of free speech and free press.

The defendants respectfully urge that this Court reassert the rule articulated in its prior holdings that "truth

114. Appendix to Jurisdictional Statement, A-17.

115. Appendix to Jurisdictional Statement, A-17. The use of a "highly offensive" test is contrary to the rule laid down by this Court in *Winters* v. *New York*, 333 U.S. 507 (1948) that a publisher "cannot be required to guess."

116. *NAACP* v. *Button*, 371 U.S. 415, 433 (1963).

may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned,[117] and to explicitly recognize that the protection includes all facts rationally related to such a discussion.[118]

The decision of the Supreme Court of Georgia creates a cloud around the newsman who must have the freedom of expression necessary to inform the public of all facts relevant to newsworthy events.

The name of the murder-rape victim published here in connection with a timely report on the court proceedings and criminal prosecutions of the accused was a matter of public interest and rationally related to the newsworthy story of clear public interest as to be privileged under the First and Fourteenth Amendments to the United States Constitution. The judgment of the Supreme Court of Georgia to the contrary should be reversed.

117. *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964).

118. *Rosenbloom* v. *Metromedia*, 403 U.S. 29 (1971); *Time, Ins.* v. *Hill*, 385 U.S. 374 (1967); *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265 (1971); *Kois* v. *Wisconsin*, 408 U.S. 229 (1972); *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971).

CONCLUSION

Appellants respectfully submit that the constitutional test of the First Amendment demands reversal of the decision of the Supreme Court of Georgia,[119] for publication of the name of the murder-rape victim should have been afforded constitutional protection as a matter of public interest[120] and as a fact rationally related[121] to the news story of the criminal prosecution of those who attacked her, such being clearly a newsworthy event and a matter of public interest.

The present decision of the Supreme Court of Georgia leaves doubt among the news media in Georgia and elsewhere as to the permissible parameters for publication under the First Amendment. Such ambiguity in news reporting is not in the public interest. The Georgia decision directly contravenes not only the express dictates of the First Amendment, but does violence to the precedents of this Court so construing the constitutional protection afforded under the First Amendment. Unless reversed, the decision of the Supreme Court of Georgia will impede the full and vigorous discussion and free and uninhibited debate[122] of matters of public interest which this Court has heretofore found to be protected under the First Amendment.

Instantaneous dissemination of news in today's world of global and satellite communication through electronic

119. Appendix to Jurisdictional Statement, A-9, 24.

120. *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971).

121. *Kois* v. *Wisconsin*, 408 U.S. 229 (1972).

122. *Rosenbloom* v. *Metromedia, supra*: "Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.'" *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 163-164, (1967) 403 U.S. at 92.

means now requires more than ever an explicit enunciation of the protection afforded the press in America to publish the news without being inhibited by the confusion created by state decisions like that of Georgia.[123] The right of the public to obtain all of the relevant news should not be impaired by uncertainties as to what may or may not be published which necessarily has been created by the complained of decision in the present case.

With all due respect, we respectfully submit that this Honorable Court should strike the Georgia statute[124] as an unconstitutional intrusion into the protection afforded by the First Amendment and, accordingly, reverse the judgment of the Supreme Court of Georgia. Such would serve to further delineate the guidelines for newsmen so as to assure that the public is fully informed of all matters of public interest or those rationally related. That newsmen should be so guided is in the public interest, as their role is one which serves always to inform the public. In the exercise of their First Amendment rights, newsmen must be permitted the broadest latitude in their reporting of the news and must be assured of freedom from harassment of lawsuits as, otherwise, they will "tend to become self-censors"[125] and, to that extent, free debate on public issues "will become less inhibited."[126] Such is not in the public interest.

For all the foregoing reasons, we respectfully submit that the decision of the Supreme Court of Georgia in the

123. Appendix to Jurisdictional Statement, A-9, 24.

124. GA. CODE ANN. § 26-9901.

125. *New York Times* v. *Sullivan*, 376 U.S. 254 (1964).

126. *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971); *Kois* v. *Wisconsin*, 408 U.S. 229 (1972); *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F.2d 858 (5th Cir. 1970).

present case is clearly erroneous as a matter of law[127] and should be reversed with direction that summary judgment be entered in defendants' favor.

Respectfully submitted,

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127. In similar actions, summary judgment has been treated as the appropriate remedy. The courts consistently recognize the heavy burden imposed on one who seeks to overcome the constitutional privilege of the First Amendment. See *Time, Inc.* v. *Johnston*, 448 F.2d 378 (4th Cir. 1971); *Treutler* v. *Meredith Corporation*, 455 F.2d 255 (8th Cir. 1972); *United Medical Laboratories, Inc.* v. *Columbia Broadcasting System, Inc.*, 404 F.2d 706 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969). ". . . where a publication is protected by the *New York Times* immunity rule, summary judgment, rather than trial on the merits, is a proper vehicle for affording constitutional protection. *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F.2d 858, 864-865 (5th Cir. 1970).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-938

COX BROADCASTING CORPORATION AND
THOMAS WASSELL,
Appellants,

v.

MARTIN COHN,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF GEORGIA

APPELLEE'S BRIEF

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Radio Station WOW v. Johnson, 326 U.S. 120 (1945) ... 6,8
Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969) 4,19
Republic Natural Gas v. Oklahoma, 334 U.S. 62 (1948) 8
Rosenbloom v. Metromedia, 403 U.S. 29 (1971) 4,12,19,20,23
Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969) 5
Stanley v. Georgia, 399 U.S. 557 (1969) 23
State v. Evjue, 253 Wisc. 146, 33 N.W. 2d (1948) 17,20
Thorpe v. Housing Authority of City of Durham, 393 U.S. 268 (1969) 6
Time, Inc. v. Hill, 385 U.S. 374 (1967) 12,24,27,29
Wolf v. Colorado, 338 U.S. 25 (1949) 11

Constitutional Provisions and Statutes

Constitution of the United States
First Amendment 3,4,5,12,20,22,23,25,27,28,29
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Ga. Code Ann. §24-2432 21
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Article 6, Code of Ethics or Canons of Journalism, American Society of Newspaper Editors 19
28 U.S.C. §1257 4,5,26
16 C.J.S. §98 6
40 J. of the Kan. Bar Assoc. 313, 314 (1971) 9
56 Cal. L. Rev. 935 (1968) 20
61 Cal. L. Rev. 920 (1973) 13,14,15

Texts & Treatises

Amir, Patterns in Forcible Rape, Univ. of Chi. Press (1971) 14
Bureau of Criminal Statistics, Cal. State Dept. of Justice, Crime and Delinquency in California, p. 102 (1967) 15
Comment, Forcible and Statutory Rape, An Exploaration of the Operation and Objectives of the Consent Standard, 62 Yal L. J. 55 (1952) 15
Clinch & Schurr, Rape, Washingtonian (June 8, 1973) 14
Criminology and Police Science, 63 Journal of Crim. Law, N. 3 (1972) 16
Emerson, T., The System of Freedom of Expression (1970) 22
Federal Bureau of Investigation, Uniform Crime Reports for the United States (1971) 13,14
Federal Bureau of Investigation, Uniform Crime Reports for the United States (1972) 14
Friendly and Goldfarb, Crime and Publicity, the Impact of News on the Administration of Justice, The Twentieth Century Fund, New York, 1967) 17
Geis, Identifying Delinquents in the Press, Federal Probation, Vol. XXIX, No. 4, Dec., 1965 18
Geis, Publicity and Juvenile Court Proceedings, 30 Rocky Mountain L. Rev. 101 (1958) 18
MacDonald, Rape Offenders and Their Victims, Springfield, Ill., Charles C. Thomas (1971) 15

Page

Meiklejohn, A., Political Freedom (1960) 27
Privacy in the First Amendment, 82 Yale L.J. 1462 (1973) 22,24
Restatement (second) of Torts (Tent. Draft No. 13, April 27, 1967) 9,18,27
Schiff, Medical Aspects of Human Sexuality, May, 1972 Ed. 13
Sexual Assault on Women and Children in the District of Columbia, 83 A.M.A.J. 1021 (Vol. 12), Dec. 1968 14
Sexual Assault on Women and Children in the District of Columbia, Southern Medical Journal (October 1969) 14
The Free-ness of Free Speech, 15 Vanderbilt L. Rev. 1073 (1962) 12
Warren & Brandeis, 4 Harv. L. Rev. 193 (1890) 10,11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-938

COX BROADCASTING CORPORATION AND
THOMAS WASSELL,
Appellants,

v.

MARTIN COHN,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF GEORGIA

APPELLEE'S BRIEF

STATEMENT OF THE CASE

Appellee agrees substantially with Appellants' statement of the case, but believes that certain additional facts should be added to put the issues in proper perspective.

The death of Appellee Martin Cohn's daughter led, some six months later, to the indictment of six young men for rape and murder (A. 19). The case became the object of the most intense publicity in which numerous charges were made (A. 30, 33). So heated was the publicity that Appellee found it necessary to remove his children from school and send his family out of town and was almost unable to continue his regular business activities (A. 31). Due to this publicity and to the facts which were being related by the press concerning the victim (Appellee's daughter) and the conduct of the defendants, a Fulton County Superior Court Judge issued an order restraining counsel for the State and the defense from making any statements to the press; however, news coverage of the case continued unabated (A. 34).

On April 10, 1972, the murder charges were dismissed by the State and five of the six defendants pleaded guilty to rape or attempted rape (A. 35). The sixth defendant pleaded not guilty and his case was set for trial (A. 35). That same evening and in the early hours of the following day during two newscasts over Appellants' local television station, the happenings in Court were related, including the identification by name of Appellee's daughter as the victim of the multiple rapes (A. 35). Because of these broadcasts, the successful prosecution of the remaining case was impeded, as Appellee was torn between seeking justice for his daughter and the well-being of his family (A. 15). Appellee's fear of future use of his and/or his daughter's name in fact led to a disposition of the case by a plea to attempted rape, rather than by a trial (A. 36).

ARGUMENT

I.

INTRODUCTION AND SUMMARY

By its ruling, the Supreme Court of Georgia has held that a civil action for invasion of privacy lies upon proof that Appellants publically disclosed the name or identity of the victim of a rape with willful or negligent disregard for the fact that reasonable men would find the invasion highly offensive. The Court further held that a 1968 Georgia criminal statute (*Ga. Code Ann.* § 26-9901)[1], which prohibits the public dissemination of the name or identity of the victim of a rape or attempted rape through the mass media, is a legislative determination that such disclosure is not a matter of public interest or general concern in Georgia. The right to disclose the identity does not rise to the level of *First Amendment* protection.[2]

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[1] Ga. Code Ann. § 26-9901: "It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor."

[2] Appendix to Jurisdictional Statement, A-9-21. A-24-26.

> "A majority of this Court does not consider this statute to be in conflict with the First Amendment. We think the General Assembly of Georgia had a perfect right to declare that the victim of such a crime should not be publicly identified by the news media. The First Amendment is not absolute; and consider this statute to be a legitimate limitation on the right of freedom of expression contained in the First Amendment."[3]

For reasons elaborated herein, Appellee does not believe, in the first instance, that this Court should grant jurisdiction as the judgment of the Supreme Court of Georgia lacks the requisite finality as mandated by *28 U.S.C. § 1257.* On the merits of the case itself, Appellee contends that, in viewing the conflicting social and constitutional values in issue, the actual *raison d'etre* for the *First Amendment* as articulated by this Court[4] is wholly inapplicable because the *First Amendment* interest in public knowledge of the specific identity of a rape victim does not exist, or is of so little importance that the social and *First Amendment* interest in privacy is overwhelming in comparison.

II.

THIS COURT DOES NOT HAVE JURISDICTION TO HEAR THIS APPEAL.

In the decision below, the Supreme Court of Georgia, pursuant to motions for summary judgment filed by both

[3] Appendix to Jurisdictional Statement, A-25.

[4] E.G., Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969) and Rosenbloom v. Metromedia, 403 U.S. 29 (1971)

parties, ruled, in effect, that Appellee's complaint stated a cause of action for invasion of privacy that was not barred by the *First Amendment*[5], also ruling that *Ga. Code Ann. §26-9901*[6] was a constitutional exercise of legislative power that declared that the public dissemination of the specific identity of the victim of a rape was not a matter of legitimate public concern in Georgia, and thereby not protected by the *First* and *Fourteenth Amendments.*[7] The Court reversed Plaintiff-Appellee's motion for summary judgment on liability, which had been granted by the trial court, and affirmed the lower court's denial of defendants-Appellants' motion for summary judgment, and the case was remanded to the trial court for a determination of the factual issues of liability.[8] It is submitted that this posture of the case does not make it a "final" judgment or decree in the sense required by *28 U.S.C. §1257.*

Before proceeding to an appropriate definition of "finality", certain of this Court's pronouncements on its role in the appellate system may help put the issues in perspective. This Court does not, for example, sit as a super legislative body and is not concerned with what philosophy a state should or should not embrace.[9] It is also not the function of

[5] Appendix to Jurisdictional Statement, A-24,25.

[6] Appendix to Jurisdictional Statement, A-26.

[7] Appendix to Jurisdictional Statement, A-26.

[8] Appendix to Jurisdictional Statement, A-12,21.

[9] Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969).

this Court to speculate as to the wisdom of a statute, or whether the evil sought to be remedied could have been regulated in some other manner.[10] Accordingly, this Court will avoid decisions of constitutional issues unnecessary to the decision of the case before it[11] and will not decide abstract, hypothetical, or contingent questions in advance of the necessity for its decision[12]. The citations of authority sustaining the proposition that legislative acts are entitled to great respect, deference and weight and will not be lightly set aside are too numerous to mention here[13]. When the power of the legislature to enact a law is called into question, the Court should proceed with great caution, and the power to review itself should be exercised sparingly and only when absolutely necessary when there is no other choice.[14]

With that background in mind, the determination must be made whether the decision of the Georgia Supreme Court possessed sufficient attributes of finality to justify this Court's granting jurisdiction. The requirement of finality, so it has been said, is not one of those technicalities to be easily scorned[15], but there is little doubt that there is a tendency

[10] Mourning v. Family Publications Service, Inc. 93 S. Ct. 1652 (1973).

[11] Alexander v. Louisiana, 405 U.S. 625 (1972).

[12] Thorpe v. Housing Authority of City of Durham, 393 U.S. 268 (1969)

[13] See, 16 C.J.S. §98.

[14] Id., §98.

[15] Radio Station WOW v. Johnson, 326 U.S. 120 (1945); Montgomery Bldg. & Constr. Trades Council v. Ledbetter Erection Co., 344 U.S. 178 (1952)

on the part of this Court to give the concept of finality as practical, as opposed to a technical, construction.[16] This tendency has not been greeted with unanimity, however, witness a series of concurring and dissenting opinions by Justice Harlan in which he charged this Court with straining precedents to the breaking point.[17]

Nonetheless, it is still true that only final judgments of state courts may be appealed to this Court. For a judgment of an appellate court to be final and reviewable for this purpose, it must end the litigation by fully determining the right of the parties, so that nothing remains to be done by the trial court "except the ministerial act of entering the judgment which the appellate courts directed."[18] Although the Court is not restricted to the face of the judgment in determining finality, the test appears to be whether the order of the appellate court has in fact adjudicated the rights of the parties and that such adjudication is not subject to further review by a state court. In a remand for trial or new trial, although the decision of the appellate court is the law of the case upon the facts as then presented that law must be applied by the trial court in accordance with the evidence presented upon trial. "We cannot assume that the Supreme Court of California would hold the ordinances in question constitutional no matter what facts might be presented upon a second trial. Indeed,

[16] Construction & General Laborers' Union v. Curry, 371 U.S. 542 (1963)

[17] Id., supra, at 542.

[18] Gospel Army v. Los Angeles, 331 U.S. 543 (1946); Department of Banking v. Pink, 317 U.S. 264, 267 (1946).

experience demonstrates that particularly in constitutional cases issues turn on factual presentation."[19] Further, "to be reviewed by this Court, a state court judgment must be final as an effective determination of the litigation and not merely interlocutory or intermediate steps therein. It must be the final word of a final court."[20] And to allow review of an intermediate adjudication would offend the decisive objection to fragmentary reviews, the mischief of economic waste, and of delayed justice.[21]

The situation in *Construction & General Laborers' Union v. Curry, supra,* is clearly distinguishable from the instant case and clarifies the principle involved. There, the specific adjudication on a demurrer by the Georgia Supreme Court finally adjudicated the whole case. There was nothing of substance to be decided in the trial court.[22] Here, a great deal remains to be litigated; above all, the liability of the Appellants on the merits, in whose favor a decision in the trial court would moot this case, rendering a decision by this Court unnecessary. In *Curry,* the decision of the appellate court *in fact disposed of the case on the merits,* and left to the lower court the performance of ministerial acts only. Decidedly, that is not the posture of this case and, for the

[19] Gospel Army v. Los Angeles, supra, at 548.

[20] Hudson Distributors v. Eli Lilly, Harlan, J., dissenting, 377 U.S. 386, 397.

[21] Radio Station WOW, Inc. v. Johnson, supra at 127; Republic National Gas v. Oklahoma, 334 U.S. 62 (1948); Pope v. Atlantic C.L.R. Co., 345 U.S. 379 (1953).

[22] Construction & General Laborers' Union v. Curry, supra at 551.

very powerful and cogent reasons enunciated by this Court restricting itself to their view of "final" judgments, the Court should dismiss this appeal for lack of jurisdiction.

III.

CONSTITUTIONAL CONSIDERATIONS

A. *Invasion Of Privacy As A Recognized Tort.*

It has become almost trite to say that an influential law review article, written by Samuel D. Warren and Louis D. Brandeis, articulated and gave birth to a new tort commonly referred to an invasion of the right to privacy.[23] The article absorbed and crystallized all that had gone on before and formulated with clarity the principle of the right to privacy. Over the following years, some thirty-three (33) states recognized the principle and the *Restatement of the Law of Torts* treats the right as being established in our common law.[24] In the leading American case on the subject [25], the Supreme Court of Georgia, through the eminent Justice Cobb, stated:

> "The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is

[23] 4 Harv. L. Rev. 193 (1890)

[24] 40 Journal of the Kansas Bar Assoc. 313, 314 (1971).

[25] Pavesich v. New Eng. Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905).

in a normal condition recognizes at once that as to each individual member of society there are matters private and there are matters public so far as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those rights which are of a public nature."[26]

The Court further stated:

"The liberty of privacy exists, has been recognized by the law, and is entitled to continual recognition. But it must be kept within its proper limits, and in its exercise must be made to accord with the rights of those who have other liberties, as well as the rights of any person who may be properly interested in the matters which are claimed to be of purely private concern. Publicity in many cases is absolutely essential to the welfare of the public. Privacy in other matters is not only essential to the welfare of the individual, *but also to the well-being of society.*"[27] (Emphasis supplied.)

Public disclosures of embarrassing private facts about a person is, as has been said, the tort of the "yellow journalist", and very well may be what caused Warren and Brandeis to write their article.[28] It is also that aspect of the tort with which we are dealing here.

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[26] Pavesich v. New Eng. Life Ins. Co., supra, 50 S.E. at 69.

[27] Pavesich v. New Eng. Life Ins. Co., Supra, 50 S.E. at 73.

[28] "The press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade which is pursued with industry as well as effrontery." Warren & Brandeis, supra, N.4 at 196.

The interest in privacy plays a number of distinct roles in regulating the relationship between the individual and society. In some instances, privacy is asserted as a restraint on governmental intrusion. Therefore, sanctity of the home underlies specific constitutional prohibitions against unreasonable searches and seizures[29], and respect for the individual's freedom of conscience has struck down governmental inquiries into beliefs and associations.[30] Additionally, *Griswold v. Connecticut*[31]. suggests that a right of marital privacy may be inferred from the general libertarian principles emanating from the *Constitution* itself.

The essential difference between the older actions for defamation or trespass and an action grounded on privacy lies in that true but indecent revelations did not come within the civil libel cause of action. Warren and Brandeis proposed the new tort in which truth would not be a defense[32]. They recognized, however, as did the Georgia Court in *Pavesich*, that the right of privacy should not prohibit "any publication of matter which is of public interest or general interest."[33].

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[29] See, e.g., Mapp v. Ohio, 367 U.S. 643 (1961); Wolf v. Colorado, 338 U.S. 25, 27-28 (1949)

[30] See, e.g., NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462-63 (1958).

[31] 381 U.S. 479 (1965)

[32] Warren & Brandeis, supra at 218.

[33] Warren & Brandeis, supra at 214.

Growing out of that formulation, it has been recognized that a broad "newsworthy" privilege exists; the factual reporting in any news medium of current news in which the public has a legitimate interest is protected.[34] This has been recognized by statute in Georgia[35], but in light of the decision of the Georgia Supreme Court in this case, the statutory privilege was impliedly held not applicable. It would seem evident, therefore, that the instant case must turn on whether the specific identification of the victim of a rape by the news media is a matter of legitimate public interest and thereby protected by the *First Amendment.*

B. *The First Amendment Does Not Protect The Publication Of The Name Of The Victim Of A Rape.*

At the outset, Appellee believes that a factual decision must be made as to whether the identification of the victim of rape is "newsworthy." If the mere fact of publication in the news media was accepted *ipso facto* as sufficient to show the existence of public interest, then the exception would consume the rule and would also presume an absolutist view of the *First Amendment* that has never been enunciated by this Court.[36] Assuming a non-absolutist view of the *First*

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[34] See, e.g., Rosenbloom v. Metromedia, 403 U.S. 29 (1971); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Time, Inc. v. Hill, 385 U.S. 374 (1967); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[35] Ga. Code §105-704 and Ga. Code §105-709(4).

[36] See, The Free-ness of Free Speech, 15 Vanderbilt L. Rev. 1073 (1962); Miller v. California, 413 U.S. 15, 23 (1973); Breard v. Alexandria, 341 U.S. at 642.

Amendment, the right to privacy asserted by Appellee must be determined by balancing the competing and conflicting social interests. As succinctly stated in *Barber v. Time, Inc.*,[37], the right of privacy is not inconsistent with freedom of expression, but only limits its abuse. The difficulty lies in determining when legitimate public curiosity becomes unscrupulous and unwarranted and, as will be discussed, what happens when there is an enormously important social value in preserving the specific privacy under discussion.

1.

The Social Interest in Prohibiting Publication Of the Name of The Victim Of A Rape Justified The Enactment Of Ga. Code Ann. §26-9901 And the Decision Of the Georgia Supreme Court.

"Rape is a form of brutality and an invasion of privacy that few victims can ever forget."[38] The increase in the number of rapes in this Nation defies description. From 1960 to 1969, ***reported*** rapes increased at roughly the same rate as other crimes,[39] but in 1969, the rape rate surged ahead of other crimes against the person of an individual, and in two

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[37] 348 Mo. 1199, 159 S.W. 2d 291 (1942).

[38] Arthur Frederick Schiff, M.D., Deputy Medical Examiner, Dade County, Florida, Medical Aspects of Human Sexuality, May, 1972.

[39] 61 Cal. L. Rev. 920 (1973); Federal Bureau of Investigation, Uniform Crime Reports for the United States 61 (1971)

of the three following years, it increased markedly.[40] During the first six months of 1972, the crime of rape increased by fourteen per cent as opposed to a decrease or slight increase in other crimes against the person or property.[41] All the evidence available seems to indicate, as an index to the dimensions of the problem, that at a maximum, only twenty per cent of all forcible rapes are ever reported.[42] The reasons why victims fail to report a rape are varied, but high on the list would seem to be the desire by parents, the victim, and others, to prevent attention, publicity, further ordeal and emotional injury by investigation and appearance in court.[43] Unfortunately, there is a paucity of studies on rape. There is also little doubt that the problem is not only increasing, but that the present system for dealing with it is unacceptable to the victims.[44] That women are aggressively attacking the notion that "it's a man's world" needs no citation of

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[40] Id. at 920, FBI, Uniform Crime Reporting 1 (Jan. - Jun. 1972)

[41] FBI, Uniform Crime Reporting 1 (Jan. - Jun. 1972)

[42] 61 Cal. L. Rev. 919, 921.

[43] See, e.g., Patterns in Forcible Rape, Univ. of Chi. Press (1971); for some insight into the problems in the District of Columbia relating to the incidence of rape and its treatment by the police and courts; See, RAPE, Clinch and Schurr, Washingtonian, June 8, 1973; Sexual Assault on Women and Girls in the District of Columbia, Southern Medical Journal October 1969, pp. 1227-1231; Sexual Assault on Women and Children in the District of Columbia, 83 A.M.A. Journal 1021 (Vol. 12), Dec. 1968.

[44] See, RAPE, Clinch and Schurr, supra.

authority; and that the rape laws are not aimed at protecting women from sexual assault, but rather, to protect male interests is a truth revealed by analyses.[45] The difficulty in convicting those charged with rape is well known[46] and lies in the structure of the rape laws which protects the defendants more than the victim to a degree not found elsewhere in criminal law[47]. In short, available statistics show that rape is a uniquely difficult social problem that is not being solved.[48]

The precise percentage of victims who fail to report rape because of fear of publicity is impossible to determine, but "fear of publicity often discourages victims from appearing in court."[49] This is directly related to the woman's shame,

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[45] Comment, Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard, 62 Yale L. J. 55, 172 (1952).

[46] See, e.g., Bureau of Criminal Statistics, Cal. State Dept. of Justice, Crime and Delinquency in California 102 (1967), showing, *inter alia*, 14.2% acquittals, 9.2% dismissed, 54.2% convicted by guilty plea, 29.9% convicted by trial.

[47] See, e.g., 61 Cal. L. Rev. 919 in which it is pointed out that juries are told that a charge of rape is easily made and difficult to defend against; that the victim's testimony must be examined with caution; evidence of the "unchastity" of the victim may discredit her testimony,etc.

[48] Id., at p. 941.

[49] MacDonald, Rape Offenders and Their Victims, Springfield, Ill., Charles C. Thomas (1971), pp. 94 and 95.

which in the extreme may be so great that she does not mention the rape to anyone at all,[50] and is also the source of why rape is a "heinous, but understudied offense".[51] Female victims of rape ordinarily do not wish to cooperate in studies of their own behavior, mainly because of the shame involved in being a victim.[52] The issue of victim-precipitated rape (*i.e.*, "she asked for it")[53] often is raised to make the issue whether the victim seemed to consent, but retracted the consent and was forced, or actually invited a sexual relationship[54]. In any event, reporting a rape has such unpleasant ramifications for the victim – both because of her reputation and the necessary caution of the police in accepting those charges – that rapes too frequently go unreported.[55] The response, it is submitted, must not only be legislative, judicial and attitude changes, but also to find a way, consistent with the *Constitution*, to reduce the reluctance of rape victims and/or their families to report the crime and testify in court. That victims or their families are justified in fearing widespread and sensationalized publicity, considering the press's penchant for dwelling on sex crimes, is

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[50] Id., p. 96.

[51] 63 Journal of Crim. Law, Criminology and Police Science, No. 3 p. 402 (1972).

[52] Id., p. 406.

[53] Certainly relevant in this case. See Appellee's Affidavit in the Appendix at A-30-32.

[54] 63 Journal of Crim. Law, supra, p. 406.

[55] Id., p. 403.

hardly disputable.[56] That the avoidance or reduction of publicity will aid law enforcement is axiomatic because the fear of publicity seriously interferes with effective law enforcement. The evidence is that it does and the very statute attacked by Appellants is precisely one way of aiding the prosecution of this specific crime.[57] Judicial recognition of this is found in *State v. Evjue*, 253 Wisc. 146 (1948), in which case the court said:

> "It is considered that there is a minimum of social value in the publication of the identity of a female in connection with such an outrage. Certain it is that the legislature could so find. At most the publication of the identity of the female ministers to a morbid desire to connect the details of one of the most detestable crimes known to the law with the identity of the victim. When the situation of the victim of the assault *and the handicap prosecuting officers labor under in such cases is weighed against the benefit of publishing the identity of the victim in connection with the details of the crime*, there can be no doubt

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[56] See, Crime and Publicity, The Impact of News on the Administration of Justice, Friendly and Goldfarb, the Twentieth Century Fund, New York (1967), in which the authors debate the fair trial versus free press issue and the pros and cons of delayed reporting. They also concluded that American press coverage of crime news is often excessive and offensive, pandering to the lowest taste and unnecessary even for the most basic commercial reasons, at page 34.

[57] See also, Section 6.0, Chapter 2, General Regulations of the New York City Police Department, which provides that representatives of the press may be advised of current news if the ends of justice are not defeated, "... but under no circumstances will the identity of the following be revealed: ... 4. victims of a sex crime."

that the slight restriction of the freedom of the press prescribed by section 348.412 is fully justified." (Emphasis supplied.)

That an enormously important social value may be attained by aiding the enforcement of the laws against rape through reducing the fear of publicity is therefore beyond dispute. Whatever its benefits, press publicity in this narrow area is no more desirable than it is a "protection" to a youthful offender being handled in the juvenile court.[58] The question remaining thusly is whether it is socially useful to identify the victim of a rape.[59]

It is on the resolution of this question, Appellee submits, that the case turns.

2.

Publication Of The Name Of the Victim Of a Rape Has No Social Utility And Is Not A Matter In Which The Public Has A Legitimate Interest.[60]

[58] For a comparison, see Publicity and Juvenile Court Proceedings by Gilbert Geis, 30 Rocky Mountain Law Review 101 (1958), and by the same authority Identifying Delinquents in the Press, Federal Probation, Vol. XXIX, No, 4, December 1965, pp. 44-49.

[59] See, Nappier v. Jefferson Standard Life Ins. Co., 322 F.2d 502 (CA-4 1963), holding that a claim for invasion of privacy was stated by a news broadcast identifying two rape victims in violation of a state statute similar to the Georgia statute in issue here.

[60] Restatement (second) of Torts (Tent. Draft No. 13, April 27, 1967), p. 126, section 652F, states the privilege as to matters of public interest in terms of matters in which the public has a legitimate interest. This implies that the scope of the privilege should be determined by the courts and not by the press itself. In adjusting the conflict between the individual desire for privacy and of the press to inform the

"A newspaper should not invade private rights or feelings without sure warrant of public right as distinguished from public curiosity."[61] What is true for the printed news media is at least as pertinent to television and the quoted ethical canon displays acknowledgement by a prestigious press association that there is a distinction between matters about which the public has a right to know, irrespective of individual feelings, and an area in which, although the public might be interested, the press has a duty to refrain from transgressing upon individual privacy. The issue is not whether the public, or a segment thereof, is curious, or desires to know something, but rather, whether the public has any legitimate concern to justify the intrusion into a person's private life.[62] To paraphrase the language of this Court in *Kois v. Wisconsin,*[63], how is the name of the victim of a rape rationally related to the news report of the event itself? For all the reasons usually ascribed to the rationale underlying freedom of speech, *i.e.*, "access to social, political, esthetic, moral and other ideas and experiences"[64] which citizens require in order to perform self-governance,[65] is not the

public, the courts must determine what are matters of legitimate public interest. In this case, there is both a judicial and legislative determination that identification of a rape victim is not a matter of legitimate public interest.

[61] Code of Ethics or Canons of Journalism, American Society of Newspaper Editors, article 6.

[62] See, Meetze v. Associated Press, 230 S.C. 390, 95 S.E. 2d 606 (1956), for a definition of an actionable invasion of the right to privacy, quoted with approval in Nappier v. Jefferson Standard Life Ins., Co., supra.

[63] 408 U.S. 229 (1972).

[64] Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969).

[65] Rosenbloom v. Metromedia, 403 U.S. 29, 41 (1971).

public's interest in factual news reporting sufficiently served by an account of the event itself without public identification of the person victimized?[66] It is submitted that Appellants have not in any instance addressed themselves to this question, but have rather cited at length cases which already assumed the central question on which the case turns. Appellee has no quarrel with the decisions of this Court assuring that the *First Amendment* is not nibbled away and concedes that were the public identification in the news media of the name of the victim of a rape a legitimate matter of public concern, then Appellee's cause of action would fall – statute or no statute. But no such legitimate public interest has been or can be shown, nor has it been so articulated other than in the very terms used by the Wisconsin Supreme Court in *Evjue, supra, i.e.*,[67] "a morbid desire to connect the details of one of the most detestable crimes known to the law with the identity of the victim." Appellants' evident justification for its publication does not grapple with the societal issues or the balancing that is involved, nor does it articulate just how the utterance involved is of public or general concern.[68] Their argument that since the name of the victim was contained in the public record (*i.e.*, indictment and docket), it was *ipso facto* privileged again begs the essential question. Surely by the fact that private citizens turn to the courts, voluntarily or, as here, involuntarily, as the innocent victims of circumstances, and that a judicial record of the transaction is made, does not sweep away their right to privacy through

[66] See, 56 Cal. L. Rev. 935, 966-967 (1968).

[67] State v. Evjue, supra.

[68] Rosenbloom v. Metromedia, supra.

some sort of implied waiver theory! It should be sufficient to say that the disclosure of the identity of the victim of rape either is or is not a matter of public interest and general concern in Georgia, aside from any so-called public record privilege. It is obvious that the Georgia Supreme Court thought the privilege of reporting judicial proceedings limited by the statute prohibiting disclosure; a justification based upon a public records theory ought similarly to be rejected by this Court.[69] The statute, in brief, aims at overpublication in the media and not with court records that will, by themselves, cause very limited publicity.

Taking into consideration all of the competing social values, particularly the compelling one regarding effective law enforcement and the fear by victims of publicity to an extent unknown in the context of other offenses, and the tenuous argument that can be made in favor of public disclosure, can it really be said that the court or legislature was without power to attain such a overridingly important goal?[70]

[69] Also, such a postulate would imply that the media could ramsack the courthouse files at random and select the most sensational divorce cases and then titillate its readers with all the details, including names, without regard to the fact that the cases were of no public interest, but were purely private domestic disputes. Such a broad view of the privilege would have the gravest social implications. It would certainly put an end to the right to privacy, at least for litigants.

[70] Compare this with those jurisdictions in which the legislature has decided that the rehabilitative goals of the juvenile law are so important as to override the right of the press to identify juvenile defendants (e.g., Virgin Islands Code, Title 5, Section 2511, Fla. Statutes Section 801.14, Ga. Code §24-2432).

3.

Appellee's Privacy Is Protected By The First Amendment.

This Court has articulated a theory of the *First Amendment* over the past decade that forms the basis of constitutional arguments for and against the public disclosure tort. Starting with *New York Times Co. v. Sullivan,*[71] in 1964, the Court, in applying the free speech guarantee, has emphasized the integral role of free speech in a democratic system and has found a *First Amendment* interest in protecting a "system of freedom of expression."[72] In deciding the constitutionality of a specific utterance, this Court has considered *the merits* of the utterance *and* its place in a constitutional system of free speech, reasoning that:

> "... free speech is protected not for some intrinsic value of speech but because it is a necessary condition for the making of informed decisions about matters of government, decisions which all citizens in a democracy are called on to make. Speech provides information, the raw material from which citizens can make self-governing choices."[73]

But this Court, while doing much to ensure the free flow of information from speaker to listener has not explicitly held that there may be a powerful *First Amendment* interest in protecting the privacy of the individual in certain cases, *i.e.*,

[71] 376 U.S. 254 (1964).

[72] See, T. Emerson, The System of Freedom of Expression, p. 517 (1970), in regard to potential unconstitutionality of the tort of public disclosure, a potentiality with which Appellee does not concur.

[73] Privacy in the First Amendment, 82 Yale L. J. 1462, 1464 (1973).

an individual's ability to control information about himself so that he may be free to make certain choices important to him which, if disclosed, would impede or chill his right to think or do unpopular things.[74] The secret ballot, the right to possess so-called obscene materials in the privacy of one's home[75], the right to marital privacy[76], and membership in associations are examples of situations in which a citizen ought to have the right to privacy and be confident of its protection. Therefore, the *First Amendment* has an interest in protecting the privacy of the individual which is as necessary to preserve a system of free expression as is the more traditional concept of freedom of the press.

The Court has held that the *First Amendment* has an interest in protecting published information, whether it be opinion or fact[77], whether the fact be true or false[78]. whether the subject of the information be public official or private citizen[79], and whether the subject be well-known or obscure[80], *if the information has First Amendment values, i.e., aids the citizen in making informed decisions.* The

[74] Id. pp. 1462 et seq.

[75] Stanley v. Georgia, 399 U.S. 557 (1969).

[76] Griswold v. Connecticut, 381 U.S. 479 (1965).

[77] New York Times v. Sullivan, 376 U.S. 254, 271-273 (1964).

[78] Id. p. 271-272.

[79] Rosenbloom v. Metromedia, supra at 31-32.

[80] Id., at 31-32.

converse of this position is equally true – the revelation of private facts have an inhibiting effect on the individual, chilling or destroying his ability to make decisions.[81]

In the instant case, in which Appellee's privacy claim faces the Appellants-publishers' claim that the information published is in the public interest and therefore privileged, the competing interests arise from the same constitutional provision with an important distinction that sets this case apart from others. Not only was Appellee inhibited in making decisions and choices because of the invasion of his privacy; the interference to his freedom seriously impeded the prosecution of a brutal crime with social affects far more adverse than that served by the publication. Furthermore, we have here a legislative determination that ostensibly decided which interest outweighed the other, *i.e.*, public disclosure of the identity of a rape victim was vastly less important than encouraging victims of rape to report the crime and testify.

Is not the solution, as suggested by highly persuasive note in the Yale Law Journal [82], to recognize that the invasion of privacy consists not in disclosing the information itself, but in linking the information to the individual in question, by name or otherwise. As the Georgia Supreme Court cogently noted in this case, "this statute does not prevent disclosure or publication of the 'event'; it merely prohibits the disclosure or

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[81] See, 82 Yale L. J. 1462 at 1468 and 1469 for the applicability of this reasoning to James Hill in Time, Inc. v. Hill, 385 U.S. 374 (1967).

[82] 82 Yale L. J. 1462.

publication of the identity of the victim of the event."[83] In short, the constitutional privilege to tell the public a piece of news should be judged separately from the "constitutional" privilege to tell the public who was involved. Presumptively, commercial success ought to have nothing to do with the privilege under discussion, though it is hardly a secret that the media's preoccupation with scandal and especially sex brings financial success.[84] The trite but accurate saying that "names are news" is undeniable, but that is a commercial fact unrelated to the constitutional decision at stake. Does the name of a given person linked to some information have value to those who hear or read the resulting news items, in that they will find it useful in arriving at the decisions of self-government? Does whatever value the use of the name of a rape victim might have[85] overwhelm the individual's *First Amendment* interest in privacy? Does not such a calculation, not in the area of the event itself, but in the area of identification, compel a conclusion that identification has a terribly negative effect on our social system by deterring

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[83] Jurisdictional Statement, A-24.

[84] See also, Briscoe v. Reader's Digest Assn. 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971), in which it was held that if the Court decides the name is not "of legitimate public interest," the publisher has no defense of privilege and the plaintiff's cause of action is good.

[85] Appellee frankly states that he has never heard from any source whatever a single logical reason suggested or proposed as to a positive value that would be served by publicly identifying the identity of the victim of a rape, whoever she might be. All the results appear to be negative and detrimental to the individual and society.

victims and their families from reporting rapes, not to mention to appalling embarrassment and humiliation caused to these unfortunates through no fault of their own.

Appellee believes that a public disclosure tort action such as this, dealing with the unauthorized use of names in a context wherein BOTH individual *and* public interests coincide in favor of privacy, must be sustained unless this Court holds that the publication privilege obliterates any zone of privacy.

CONCLUSION

For this Court to assume jurisdiction of this case in its present posture, before a trial or adjudication of the merits, would do violence to the letter and intent of *28 U.S.C. §1257.* It would needlessly have this Court review the constitutionality of state legislation and a decision of the highest court of a state without knowing, through a trial, whether the facts of this case will even bring into play the issues sought to be reviewed. Repeated decisions of this Court point out the inappropriateness of deciding constitutional issues except when necessary, and only upon a final judgment or adjudication of the highest court of a state. Therefore, this appeal should be dismissed.

Should this Court grant jurisdiction, however, the type of invasion of privacy at issue concerns unreasonable publicity given to one's private life. This species of the tort is not concerned with the truth or falsity of the material published, but rather focuses on the publication of material concerning an individual's private life, which is highly offensive to the

reasonable man with ordinary sensibilities.[86] Aside from the postulated theory that there is a *First Amendment* interest in privacy, the constitutional protection applies only, as this Court explicitly held in *Time, Inc. v. Hill,* 385 U.S. 374 (1967), to matters of public interest:

> "We hold that the constitutional protections for free speech and press preclude the application of the New York statute to redress false reports of *matters of public interest* in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth."

And although there was an emphasis on falsehood germane to a defamation case and irrelevant to a privacy case, the same constitutional principles seem to apply to either tort. The impact of the *Hill* decision, by its very terms, was expressly limited to the sphere of publications in which the public has a legitimate interest. The public interest test implies *the existence of a non-public interest zone,* and the rationale of this Court's opinion in *Hill* indicates that the malice and falsity tests would not be there applicable. In this category would be suits based on commercial exploitation or involving unjustified revelations of embarrassing or offensive details of a person's life.[87] Although the eminent writer Meiklejohn does not balance individual interests against the *First Amendment,* he does define speech as public or private.[88] Once an expression is found to have "governing importance", it is

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[86] Restatement (second) of Torts, Section 652C, commented at 115.

[87] See, A. Meiklejohn, Political Freedom (1960).

[88] Id., at 56-57, 79.

protected; if not, presumably, actions for invasions of privacy would be permitted when the public interest was not involved.

Whichever theory is employed, "public interest in the abstract" is not ordinarily a simple phrase to define, but if ever a specific report rendered that definition less difficult, this is such a case. That no precise definition can be made for all cases in which all courts can agree is clearly an acceptable price to be paid for any approach to the *First Amendment* which is not absolute. A case-by-case method is, after all, the common law approach, typified by flexibility and abstention from dogma.

This case does not and should not have broad sweep, nor does Appellee suggest a rule of constitutional law any broader than the facts presented herein. Based upon a balancing of the interests theory, or on competing *First Amendment* interests, the principles enunciated in this case should and must have reference to the specific facts. Any other resolution could have the severest negative effects; *i.e.,* an absolutist view *vis-à-vis* public disclosure will obliterate the individual interest in privacy and the strong public interest in its affirmance in this case with decidedly negative repercussions for law enforcement; and a decision that sweeps too broadly in the other direction without regard to the facts could undoubtedly give a green light to those who would like to stifle a free press.

Appellee cannot urge too strongly his support for free speech and press; but, at the risk of seeming redundant, respectfully submits that the speech involved here simply does not rise to the level that warrants *First Amendment* protection.

Acceptance of the right to privacy has grown with the increasing capability of mass media and electronic devices to destroy an individual's anonymity, intrude upon his most intimate activities, and expose his most personal characteristics to public scrutiny.[89] Surely there is a line, an outer limit, at which point the individual is given constitutional protection and justice.[90] To say otherwise would be to say that "*the First Amendment* not only precludes effective prosecution of the right of privacy,"[91] but also obliterates the at least equal public interest of the state in securing adequate law enforcement.

Respectfully submitted,

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[89] Briscoe v. Reader's Digest Assoc., supra; Gill v. Curtis Pub. Co., 38 Cal. 2d 273, at 277-278, 239 P.2d 630; Gill v. Hearst Pub. Co., 40 Cal. 2d 224, 228, 258 P.2d 441.

[90] It is suggested that the usual role of the Press being depicted as David doing battle with Goliath is not apposite in this instance. The media have become very powerful indeed, especially in those cities which have but one newspaper or a single television outlet and wherein the press as an institution may be as powerful as government. Such power may not be wholly beneficial as absolute power never is. The concern over privacy is of intense current interest as witness proposals to protect individual's from prying computers, financial institutions and even two-way cable television, as noted in an address in June, 1974 by Vice President Gerald Ford to the Convention of the State Bar of Georgia in Savannah. See also, Alan F. Westin, Privacy and Freedom, Atheneum, New York, 1967.

[91] Time v. Hill, supra, dissent of Justice Fortas.

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IN THE

Supreme Court of the United States

October Term 1973

No. 73-938

COX BROADCASTING CORPORATION, et al.,

Appellants,

-vs-

MARTIN COHN,

Appellee.

On Appeal from the Supreme Court of Georgia

BRIEF FOR THE STATE OF GEORGIA AS AMICUS CURIAE

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BRIEF FOR THE STATE OF GEORGIA AS AMICUS CURIAE

INTEREST OF THE STATE OF GEORGIA

The "right of privacy" has been defined as:

> ". . . the right to be free from the unwarranted appropriation or exploitation of one's personalty, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities. The right of privacy has also been defined as the right to be let alone, to be free from unwarranted publicity, and to live without unwarranted interference by the public in matters with which the public is not necessarily concerned." 62 Am. Jur. 2d, *Privacy* § 1 (1972).

This Court has referred to the "right of privacy" which the citizens of this country enjoy as being "one of the unique values of our civilization." See *McDonald v. United States*, 335 U.S. 451, 453 (1948). It has spoken of the right as being

of "the very essence of constitutional liberty," declaring its protection to be just as imperative as is the protection of those other rights we call "fundamental." See *Harris v. United States*, 331 U.S. 145, 150 (1947). Since the State of Georgia, through *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 50 S.E. 68 (1905), was the first American jurisdiction to recognize the right as one for whose infringement the law will give redress, it can come as no surprise that Georgia is in complete accord with the high value which the Court has placed on this personal freedom of our citizens. Having championed this protection of the individual citizen's liberty and sensibility in the past, Georgia desires to prevent its erosion in the present. This is no less so simply because the attack upon this fundamental right is launched in the name of "freedom of the press" or "freedom of speech." It is in this light that we submit that the State of Georgia has an interest in upholding the case and statutory law it has developed in vindicating its citizens' right to privacy. This State law is under attack in the case at bar. Additionally, the case at bar appears to place in issue a State statute which not only protects the privacy of the individual, but also serves the salutary public purpose of facilitating the reporting and prosecution of one of mankind's most loathsome crimes—the crime of rape. For this reason too the State of Georgia has a vital interest in this Court's adjudication of the case at bar.

OPINION BELOW

The opinion of the Supreme Court of Georgia is reported in *Cox Broadcasting Corporation v. Cohn*, 231 Ga. 60, 200 S.E.2d 127 (1973). The additional written opinion of that court denying Cox Broadcasting Corporation's motion for rehearing is set forth immediately following the initial decision. See 231 Ga. at pp. 68-69, 200 S.E.2d at pp. 133-134.

JURISDICTION

Appellants (Cox Broadcasting Corporation, et al.) have invoked this Court's jurisdiction under 28 U.S.C. § 1257 on the ground that it is an appeal from a final judgment of the Supreme Court of Georgia in a case which has drawn into question the validity under the Constitution of the United States of a State statute, to wit: Ga. Laws 1968, pp. 1249, 1335 (Ga. Code Ann. § 26-9901). On February 19, 1974, the Court entered an order postponing the question of jurisdiction to the hearing of the case on the merits. For reasons which will be more fully detailed in the argument portion of this brief, it is the position of the State of Georgia that jurisdiction is lacking because (1) the judgment of the Supreme Court of Georgia from which the appeal is taken is not a "final order" within the meaning of 28 U.S.C. § 1257, and (2) that the State statute alleged to have been drawn into question is in fact only tangentially involved and hence not a proper basis for an appeal under 28 U.S.C. § 1257(2).

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

Tangentially involved to the extent that it is reflective of the State's policy with respect to the right of privacy of a female who has been victimized by the crime of rape is Ga. Laws 1968, pp. 1249, 1335 (Ga. Code Ann. § 26-9901):

> "It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor."

Also involved are the following provisions of the United States Constitution:

U. S. Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U. S. Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U. S. Constitution, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U. S. Constitution, Amendment IX:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

U. S. Constitution, Amendment X:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

U. S. Constitution, Amendment XIV, Sec. 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

1. Does this Court have jurisdiction under 28 U.S.C. § 1257 to hear this appeal?
2. Is the right of privacy of a grieving father whose daughter died shortly following and possibly as a consequence of being raped, as applied to his right not to have his deceased daughter's name publicized and broadcast by the news media in connection with the crime, to be set at naught by virtue of the First Amendment?

STATEMENT

The factual background of the case has been set forth in considerable detail by the able briefs submitted on behalf of the Appellants and Appellees and would not appear to require any further amplification in this *amicus* brief.

ARGUMENT

1. This appeal does not fall within the purview of 28 U.S.C. § 1257 and consequently should be dismissed for want of jurisdiction.

(a) *There is no "final" judgment.*

To be reviewable by this Court under 28 U.S.C. § 1257 the judgment or decree rendered by the highest court of a State must be a *final* judgment. This Court has construed the requisite finality under the statute to be the "effective determination of the litigation," [1] or in other words an adjudication fully determining the rights of the parties so that nothing remains to be done by the trial court except the ministerial act of entering the judgment which the appellate court directed.[2] In *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68 (1948), for example, the court said:

> ". . . the requirement of finality has not been met merely because the major issues in a case have been decided and

[1] See *Market Street Railway Co. v. Railroad Commission of California*, 324 U.S. 548, 551 (1945).

[2] See *Gospel Army v. Los Angeles*, 331 U.S. 543, 546 (1947).

> only a few loose ends remain to be tied up—for example, where liability has been determined and all that needs to be adjudicated is the amount of damages. * * * On the other hand, if nothing more than a ministerial act remains to be done, such as the entry of a judgment upon a mandate the decree is regarded as concluding the case and is immediately reviewable."

In the case at bar the decision of the Supreme Court of Georgia has not even reached the point of determining liability, much less the amount of damages. Here even more than in *Republic Natural Gas Co.* must it be said that what remains to be done cannot be described as merely "ministerial." The decision shows on its face that it is but an interim judgment with the cause having been remanded for full trial on the merits.[3] The Georgia Supreme Court in fact did but two things. It first of all held (favorable to Appellants) that the State statutory enactment which prohibits disclosure of the identity of a rape victim, i.e. Ga. Laws 1968, pp. 1249, 1335 (Ga. Code Ann. § 26-9901) does *not* give rise to a civil cause of action in favor of the victim, or in this case, in favor of the deceased victim's father. The second holding (adverse to Appellants) was that the complaint, wholly without regard to the statute, did set forth cause of action based upon an alleged invasion of Appellee's right of privacy by Appellants' broadcasting and publicizing his deceased daughter's name, identifying her as a rape victim. In remanding the case for further proceedings consistent with its opinion the Supreme Court of Georgia made it abundantly clear that it was *not* holding that any liability existed as a matter of law. In the words of that court:

> "Although the appellee's complaint in this case stated a claim for relief, the public disclosure, admitted by the appellants, did not establish liability on the part of the appellants as a matter of law. Whether the public disclosure actually invaded the appellee's 'zone of privacy,' and if so to what extent, are issues to be determined by the fact-finder. And in formulating such an issue for determination by the fact-finder, it is reasonable to require the appellee to prove that the appellants invaded his privacy with wilful or negligent disregard for the fact that reasonable men would find the invasion highly offensive." 231 Ga. at p. 64, 200 S.E.2d at p. 131.

[3] Nor can it be said that the situation resembles *Mills v. Alabama*, 384 U.S. 214, 217 (1966), where the Court held that appellate jurisdiction existed under 28 U.S.C. § 1257 in spite of the fact that the case had been remanded for further proceedings not inconsistent with the Alabama Supreme Court's decision. In *Mills* this Court carefully noted that the record indicated that under the judgment of the Alabama Supreme Court the trial on remand would have been no more than a formal gesture leading inexorably to a conviction. No such foreordained result exists in the case at bar.

It goes without saying that the questions of how these issues would be resolved and whether or not any liability at all would attach to Appellants' actions remain wholly open. Should these questions be resolved in Appellants' favor, with no liability being incurred, any and all necessity for this Court's adjudication of the constitutional issues raised will be obviated. Thus dismissal of this appeal from a judgment which is manifestly not "final" within the meaning of 28 U.S.C. § 1257 would also be in accord with this Court's long-standing policy of refraining from constitutional adjudications where they are not absolutely necessary to the decision of the case. See, *e.g. Alexander v. Louisiana*, 405 U.S. 625, 633 (1972); *United States v. International Union United Automobile, Aircraft and Agricultural Implement Workers of America*, 352 U.S. 567, 590-591 (1957); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-347 (1936). We respectfully submit that for the foregoing reasons this appeal should be dismissed for want of jurisdiction.

(b) *The State statute claimed to have been drawn into question in this case is really only tangentially involved and hence will not support an appeal under 28 U.S.C. § 1257(2).*

As we have already pointed out, the one clear *holding* of the Supreme Court of Georgia in connection with Ga. Laws 1968, pp. 1249, 1335 (Ga. Code Ann. § 26-9901) was in favor of rather than against Appellants. The court held that the statute, which prohibits and declares it to be a misdemeanor:

> ". . . to print and publish, broadcast, televise or disseminate through any other median of public dissemination . . . the name or identity of any female who may have been

> raped or upon whom an assault with intent to commit rape may have been made",

had *not* created a civil cause of action for damages in favor of the victim or anyone else. The trial court's summary judgment to the contrary was thereupon reversed. See 231 Ga. at pp. 61-62, 200 S.E.2d at p. 129.

In so holding the Supreme Court of Georgia, in its *original* opinion, expressly refrained from any adjudication of the statute's constitutionality, saying:

> "Since we rule that the statute did not create a civil cause of action, it is unnecessary for us to consider and rule on the various attacks made on the statute by the appellants." 231 Ga. at p. 62, 200 S.E.2d at p. 130.

Had the matter ended here there obviously would have been no question as to the absence of that State court adjudication of a State statute's constitutionality necessary to jurisdiction under 28 U.S.C. § 1257(2). But this initial clarity was unfortunately somewhat clouded by the language of the additional opinion which the court rendered in denying Appellants' motion for rehearing. The motion was based upon the contention that the public disclosure or publication in question was "a matter of public concern" and therefore constitutionally privileged. (A. 57-58) The Supreme Court of Georgia, concluding that the statute was declaratory of the State's public policy on the matter, thought it to be "[i]mplicit, though not explicit" in Appellants' argument that the Court should declare the statute violative of the First Amendment. 231 Ga. at p. 68, 200 S.E.2d at p. 134. The court replied to this "implicit" argument by saying that a majority of the court did not *consider* the statute to be in conflict with the First Amendment, adding that: "We *hold* that this 1968 Georgia statute is not unconstitutional. . . ." 231 Ga. at p. 69, 200 S.E.2d at p. 134.

But while the Supreme Court of Georgia may have used the word "hold" we cannot help but question whether what it said it held is in fact a holding. Appellants were manifestly not being prosecuted under this criminal statute and the court in no way modified its decision (favorable to Appellants) that it could not be the basis of any civil liability. As we see it the

statute is involved only tangentially in the sense that it is reflective of the State's public policy concerning the public disclosure of the name or identity of a rape victim. Such tangential involvement is not ordinarily sufficient to satisfy the jurisdictional requirements of 28 U.S.C. § 1257(2). See *Garrity v. New Jersey*, 385 U.S. 493, 495-496 (1967). For this reason too we think the appeal should be dismissed on jurisdictional grounds.

2. The right of privacy of a grieving father whose daughter died shortly following and possibly as a consequence of being raped, as applied to his right not to have his deceased daughter's name publicized and broadcast by the news media in connection with the crime, needs not and ought not to be destroyed by the First Amendment.

(a) *The "right of privacy" is fundamental.*

The philosophical basis of the Supreme Court of Georgia's initial American recognition of the right to privacy in *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 50 S.E. 68 (1905), was that a person's "liberty" embraces more than mere freedom from physical restraint, that to the extent that it does not interfere with the rights of another or of the public it also protects his personal sensibilities and that which might presently be referred to as his chosen "life-style." In words which ring as true today as they did in 1905:

> "When the law guarantees to one the right to the enjoyment of his life, it gives to him something more than the mere right to breathe and exist. While of course the most flagrant violation of this right would be deprivation of life, yet life itself may be spared and the enjoyment of life entirely destroyed. An individual has a right to enjoy life in any way that may be most agreeable to him, according to his temperament and nature, provided that in such enjoyment he does not invade the rights of his neighbor or violate public law or policy." 122 Ga. at p. 195, 50 S.E. at p. 70.

The court concluded that:

> "The right of privacy within certain limits is a right de-

> rived from natural law, recognized by the principles of municipal law, and guaranteed to persons in this State by the constitutions of the United States and of the State of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law." 122 Ga. at p. 197, 50 S.E. at p. 71.

That it wasn't until *Pavesich* that the infringement upon an individual's right to privacy became recognized as a common law tort, is not to say that the concept isn't much older. As pointed out by Professor Roscoe Pound in *Interests of Personality*, 28 Harv. L. Rev. 343, 357 (1915):

> "In Greek law every infringement to the personality of another is . . . (contumelia); the injury to honor, the insult, being the essential point, not the injury to the body. In Roman law, injury to the person is called *injuria*, meaning originally insult, but coming to mean any willful disregard of another's personality. In consequence the beginnings of law measure composition not by the extent of the injury to the body, but by the extent of injury to honor and the extent of the desire for vengeance thus aroused, since the interest secured is really the social interest in preserving the peace."

Indeed *Pavesich* itself was in great measure brought about by the espousal of this right in the much cited law review article of Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

While judicial acceptance of the *Pavesich* decision in other jurisdictions was initially somewhat slow, it was quite generally applauded in law review articles. As Professor Pound put it:

> ". . . while the law is slow in recognizing this interest as something to be secured in and of itself, it would seem that aggressions of a type of unscrupulous journalism, the invasions of privacy by reporters in competition for a 'story,' the activities of photographers, and the temptation to advertisers to sacrifice private feelings to their individual gain call upon the law to do more in the attempt to secure this interest than merely take incidental account of infringements of it. A man's feelings are as much a part

> of his personality as his limbs." Pound, *Interests of Personality*, 28 Harv. L. Rev. 343, 363-364 (1915).

But the pace of judicial recognition was not destined to remain so slow. According to Dean Prosser:

> "Along in the thirties, with the benediction of the *Restatement of Torts*, the tide set in strongly in favor of recognition, and the rejecting decisions began to be overruled. At the present time the right of privacy, in one form or another, is declared to exist by the overwhelming majority of the American courts." Prosser, *Privacy*, 48 Cal. L. Rev. 383, 386 (1960).

Mr. Nizer tells us in *The Right of Privacy*, 39 Mich. L. Rev. 526, 559 (1941), that:

> ". . . the doctrine grew up in response to a need created by the complexities of modern life."

And lest it be thought that the invasions of privacy made possible by electronic eavesdropping devices pose problems unique to the present generation, it may be pointed out that as early as 1939 Georgia's Court of Appeals concluded that an individual's right to privacy had been infringed by a hidden microphone which had been placed in her private hospital room to monitor her conversations. See *McDaniel v. Atlanta Coca-Cola Bottling Company*, 60 Ga. App. 92, 2 S.E.2d 810 (1939).

The Supreme Court of Georgia has also taken the lead in recognizing that the individual sensibilities protected by the right of privacy may in some situations include relational interests or the feelings engendered by close familial bonds. This was presaged by that court in its very initial "right to privacy" decision, *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 210, 50 S.E. 68, 76 (1905), where by way of dicta it was suggested that in a proper case the relatives of a deceased could protect the memory of their kinsman. Subsequently, in *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S.E. 194 (1930), the parents of a malformed infant who had died shortly following his birth were held to have had *their* right to privacy infringed by the publication of their deceased son's picture in the newspaper. Accord, *Smith v. Doss*, 251 Ala. 250, 253, 37

So.2d 118, 121 (1948). This "relational interest" application of the right to privacy has been favorably commented upon in Green, *Relational Interests*, 29 Ill. L. Rev. 460 (1934). As stated by Robert Kennedy in *The Right to Privacy in the Name, Reputation and Personality of a Deceased Relative*, 40 Notre Dame Lawyer 324, 325 (1965), the concept rests upon:

> ". . . the intimacy of the relation which should give the relative a protectable interest in the name, personality and reputation of the deceased. The intimacy is such that the postmortem abuses of name, personality and reputation necessarily harm surviving relatives."

Since it is *individual* sensibilities which the "right of privacy" protects, we would submit that there is nothing at all illogical in recognizing that the individual's deepest feelings quite ordinarily include those which stem from such close familial affections as husband and wife or parent and child.

This is not to say, on the other hand, that "sensibility" is a purely subjective matter to be determined by whatever a given plaintiff personally finds offensive. As Dean Wade puts it:

> "The standard for invasion of the right of privacy is phrased in terms of the effect of the statement on the plaintiff, himself, and indicates that it must be offensive to him. But the standard is still not subjective; the courts speak of the requirement that it be offensive to a person of ordinary sensibilities." Wade, *Defamation and the Right of Privacy*, 15 Vand. L. Rev. 1093, 1111 (1962).

The protection afforded by law does not extend to supersensitiveness or agoraphobia. See *Davis v. General Finance & Thrift Corp.*, 80 Ga. App. 708, 711, 57 S.E.2d 225, 227 (1950); 62 Am. Jur.2d *Privacy* § 13; Prosser, *Privacy*, 48 Cal. L. Rev. 383, 390-391, 396 (1960).

Nor do we question the fact that the right to privacy is one which must necessarily be limited by the legitimate rights of others or of the public. This was fully recognized even in the initial *Pavesich* decision when the Georgia Supreme Court stated that:

> "It may be that there will arise many cases which lie near the border line which marks the right of privacy on the one hand and the right of another individual or the public on the other. But this is true in regard to numerous other rights which the law recognizes as resting in the individual." See 122 Ga. at p. 200, 50 S.E. at p. 72.

While for reasons to be discussed we do *not* think it is applicable in the case at bar, one illustrative limitation of the right of privacy is that it cannot be applied so as to prohibit the publication or broadcasting of a matter which is of *legitimate* public or general interest. See, e.g. *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 204, 50 S.E. 68, 74 (1905); Annot. *Right of Privacy*, 168 A.L.R. 446, 453 (1944). This as well as other competing interests and values of both other individuals and of the public in general will almost always call for judicial "balancing" on a case by case basis, and we shall deal with the "balancing" involved in the case at bar in a subsequent portion of this brief.

Before departing from this threshold discussion of the right to privacy, however, it is of utmost importance to note that while its precise boundaries may not be entirely clear, the right is in principle at least, widely recognized to be one which is not only constitutionally protected but which rises to the level of a "fundamental right." As is not infrequently the case regarding such "fundamental rights," the citizen's privacy has been deemed to have been secured by multiple provisions of our Constitution. We have already mentioned that *Pavesich* refers to the right to privacy as being part of the citizen's "liberty," and as such protected against undue governmental interference by the "due process" clause of our Constitution. See p. 10, *supra*. This, of course, involves both the Fifth and Fourteenth Amendments. This Court, as the Supreme Court of Georgia in *Pavesich*, has expressly recognized that the protection of "liberty" under these provisions is not limited to mere physical restraint but also includes the safeguarding of various rights of his personality. See *Board of Regents v. Roth*, 408 U.S. 564, 572-573 (1972); *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

The right of a citizen to privacy also appears to be firmly rooted in the Fourth Amendment, which is designed, *inter alia*,

to protect: "(t)he right of the people to be secure in their persons . . . ." As this Court put it in *Davis v. United States*, 328 U.S. 582, 587 (1946), the Fourth Amendment affords.

> "protection of the privacy of the individual, his right to be let alone."

In *Harris v. United States*, 331 U.S. 145, 150 (1947), it was similarly pointed out that:

> "This Court has consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment '. . . are to be regarded as the very essence of constitutional liberty; and the guarantee of them is as important and imperative as are the guarantees of the other fundamental rights of the individual citizen . . .' "

It has also been suggested that there is a First Amendment interest in protecting the privacy of the individual which is no less important than the protection which is provided for his "freedom of speech." A note entitled *Privacy in the First Amendment*, 82 Yale L. J. 1462 (1973), reasons that:

> ". . . if a free expression system is to be maintained, the First Amendment has an interest in protecting the privacy of the individual." *Id.* at p. 1468.
>
> "The First Amendment has an interest in protecting a broad range of speech; it has also a parallel interest in protecting a broad range of privacy." *Id.* at p. 1469.

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), this Court appears to have reached the same conclusion when it said:

> ". . . the First Amendment has a penumbra where privacy is protected from governmental intrusion." 381 U.S. at p. 483.

Griswold, of course, is also of significance in connection with the concurring opinion of Justices Goldberg, Warren and Brennan. Their views would appear to recognize both the fundamental nature of the citizen's right of privacy and the fact that it is protected by multiple provisions of our Constitution. The citizen's privacy is referred to in this concurring opinion as being among those fundamental rights protected by

the Ninth Amendment, 381 U.S. at pp. 488-494.[4] In connection with the protection under the Fourteenth Amendment's "due process" clause this concurring opinion further reminds us that:

> "The Court stated many years ago that the Due Process Clause protects those liberties that are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'." 381 U.S. at p. 487.

In summary, we do not believe that there can be the slightest doubt as to the fact that the individual's right to privacy, which the Supreme Court of Georgia first recognized in *Pavesich*, is today to be counted as one of the most important rights which our Constitution and laws accord to the individual citizen. He has indeed a broad right to be let alone in his happiness and contentment as well as (in the case at bar) in his grief.

(b) *Freedom of Speech.*

It goes without saying that freedom of speech is also among the unique values of our civilization. Yet, we think, it is equally obvious that this fundamental value is not and cannot be any more "absolute" than is the at least equally important "right to privacy."[5] For example, "freedom of speech" has never

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[4] For the same reasons the right to property might be construed to be one of those rights reserved to the people by the Tenth Amendment.

[5] It is arguable, of course, that the "right to privacy" is of an even higher priority than freedom of speech. According to the late Professor Alexander Meiklejohn the central role and purpose of freedom of speech under the First Amendment is to enhance the operation of our particular form of government—where it is the People who govern, and where it is the agencies of government, federal and state who are *their* servants rather than vice versa. See Meiklejohn, *The First Amendment is an Absolute*, The Supreme Court Review, pp. 245, 253 (1961). Thus the speech which Dr. Meiklejohn considers to be protected by the First Amendment is that which is of "governmental importance" (i.e. having some involvement with the self-government of our citizens). See also Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. 1 (1965). This view has achieved considerable support by the courts of late. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), for example, this Court spoke of our "profound national commit-

been thought of as protecting perjury, the misbranding of food or drugs, fraud and deceit, contempt of court, Hatch Act violations, the cry of fire in the crowded theater, or the numerous other oral and written declarations which society has thought necessary to disallow. Thus has it been observed that:

> "Freedom of speech under Anglo-American law has never been an absolute right, and numerous exercises of free speech (and of free press) have been subjected to inhibiting legal sanctions, both criminal and civil, almost from the beginning of our common law heritage." Leflar, *The Free-ness of Free Speech*, 15 Vand. L. Rev. 1073 (1962).

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[5] (cont'd)

ment to the principle that debate on public issues should be uninhibited, robust, and wide-open" and said:

> "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, as we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " 376 U.S. at p. 269.

In a similar vein, recent decisions involving the "freedom of speech" of teachers have distinguished between a teacher speaking out *as a citizen on matters of public concern* (protected by the First Amendment), see, e.g. *Pickering v. Board of Education of Township Highschool*, 391 U.S. 563, 568 (1968), and a teacher speaking *as a teacher on matters not of public concern* (*not* protected by the First Amendment). See, e.g. *Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1973), *cert. denied*, 411 U.S. 972 (1973).

But while "freedom of speech" (under the Meiklejohn interpretation at least) has *the proper functioning of our particular form of government* as its central purpose, it is difficult to justify even so much as *the very existence of government, regardless of its form*, if it does not perform its most basic duty of all—which is protection of the personality of its citizens. As Art. I, Sec. I, Par. II of the Constitution of the State of Georgia of 1945 (Ga. Code Ann. § 2-102) expressly recognizes:

> "Protection to person and property is the paramount duty of government . . . ."

We believe that the right of a free man to protect his private sensibilities from unwarranted invasion or publicity is an indispensible part of his personality. We agree with what Justice Stewart said about the citizen's personality in *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) [concurring opinion]:

As this Court put it in *Chaplinski v. New Hampshire*, 315 U.S. 568, 571-572 (1942):

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Indeed even where the language in question clearly falls within the protective penumbra of the First Amendment (e.g. speech made as a citizen-critic upon matters of public concern), the Court has recognized the possibility of the interest in the protected speech being overbalanced by other interests. In *Pickering v. Board of Education of Township Highschool*, 391 U.S. 563, 568 (1968), for example, it was said that:

> "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern, and the interest of the

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[5] (cont'd)

> "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself is left primarily to the individual State under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system."

As fundamental as "freedom of speech" may also be in our constitutional scheme of things, we submit that it is really not unthinkable to suggest that in a thoughtful ordering of values the citizen's right to privacy may be of even greater importance.

> State, as an employer, in promoting the efficiency of the public service it performs through its employees."

One commentator has observed in reviewing the various exceptions and limitations of "free speech":

> "What the courts have done in these hard cases has been essentially the same as they have done in the easy mass of cases. They have weighed the social values inherent in the particular free speech, as they saw these values, against the competing interests, and have concluded that the values inherent in the competing interests were the weightier." Leflar, *The Free-ness of Free Speech*, 15 Vand. L. Rev. 1073, 1083-84 (1962).

(c) *The balancing of the fundamental rights of "privacy" and "freedom of speech" in the present case.*

Pavesich v. New England Life Insurance Co., 122 Ga. 190, 50 S.E. 68 (1905), did not ignore the inevitable conflict and balancing which is inherent in the simultaneous existence of the citizen's right to privacy and his constitutional guarantees respecting freedom of speech and the press. The court observed that:

> "The stumbling block which many have encountered in the way of a recognition of the existence of a right of privacy has been that the recognition of such right would inevitably tend to curtail the liberty of speech and the press. The right to speak and the right of privacy have been coexistent. Each is a natural right, each exists, and each must be recognized and enforced with due respect for the other." 122 Ga. at p. 202, 50 S.E. at p. 73.

With respect to the limitations of freedom of the press and speech the Georgia court said:

> "The right preserved and guaranteed against invasion by the constitution is therefore the right to utter, to write, and to print one's sentiments, subject only to the limitation that in so doing he shall not be guilty of an abuse of this privilege *by invading the legal rights of others.*" 122 Ga. at p. 203, 50 S.E. at p. 73 (emphasis added).

The right to privacy, on the other hand, is also limited. One of the most important limitations is that it cannot be applied

so as to prohibit the publication or broadcasting of matters *which are of legitimate public or general interest.* This too was recognized in *Pavesich.* See 122 Ga. at p. 204, 50 S.E. at p. 74. And as this Court more recently said in *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967):

> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."

Stripped to its bare bones, Appellants' present case (disregarding its jurisdictional problems) rests squarely upon their claim that broadcasting the name of Mr. Cohn's deceased daughter on television as the victim of multiple rapes—regardless of what it did to him in his sorrow over the event—is, as this Court put it in *Time, Inc. v. Hill, supra*, "needed or appropriate to enable the members of society to cope with the exigencies of [our] period." Thus, say Appellants, their identification of the victim is privileged as a matter of legitimate public interest and concern. We not only strongly disagree, we find the argument quite incredible. Can it seriously be maintained that there is not a clear distinction between informing the public that a particular crime has been committed (along with full airing of all essential details, if need be) and the disclosure of the victim's name by the news media? We think it to be a self-evident truth that:

> "In public disclosure cases in which the plaintiff is not well-known, the First Amendment interest of the public, operating through the publisher, is satisfied by the publication of the fact or event; the First Amendment interest of the subject is satisfied if the publisher refrains from identifying him. Hence, there is no constitutional objection to preserving a tort remedy for the plaintiff if the publisher does identify him and thereby injures his privacy." Note, *Privacy in the First Amendment*, 82 Yale L. J. 1462, 1470-1471 (1973).

What possible societal interest can there possibly be in allowing WSB-TV to claw open the still fresh wounds of the rape victim's father?

Appellants seem to take the view that what constitutes a legitimate public interest or concern is a question which falls exclusively to the unfettered discretion of the leviathan news media. See, e.g., Appellants' Brief, pp. 29. Should this disaster ever come to pass it seems obvious to us that the right of the individual citizen to privacy in this country is dead. To the news media whatever they desire to print would *ipso facto* be a matter of public interest and concern. Surely in a society which prides itself in its belief in the dignity of man we can do better than this for the privacy (i.e. "liberty") of the individual citizen. The balancing, after all, is not that which must take place between the right to privacy of one citizen and the freedom of speech of another citizen. It is between the individual citizen and an aggressive and frequently insensitive communications media whose powers in many respects have come to rival those of government itself, whose actions can be almost as repressive and injurious to the personality of the individual citizen as can those of government itself, but which unlike government itself is in no way responsible to the people through the ballot. We think it is entirely open to question whether the priority to be given to the freedom of speech of these large corporate commercial enterprises is of the same level as that secured to the individual citizen.[8] We respectfully submit that it is entirely proper for the government, which *is* responsible to the people, to establish guidelines (subject, of course, to constitutional limitations) as what will and what will not be deemed to be a matter of legitimate public concern and interest—at least where the individual citizen's right to privacy is concerned. Government may do so, we submit, both through appropriate legislation or through judicial decisions. If the right of privacy is constitutionally protected, surely it can be legislatively vindicated.

In a situation quite analogous to the case at bar, i.e. *State v. Evjue*, 253 Wisc. 143, 33 N.W.2d 305 (1948), a publisher who violated a Wisconsin statute making it unlawful to publish the

[8] In a somewhat different context this Court has indicated that commercial speech is not accorded the same degree of protection as the comments of the citizen-critic concerning his governance. See *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973).

identity of a rape victim contended that his prosecution conflicted with his constitutional guarantees of "freedom of speech" and "freedom of the press" as well as with his "due process" and "equal protection" rights under the Fourteenth Amendment. In rejecting this contention the Supreme Court of Wisconsin gave what we believe to be the correct answer when it said:

> ". . . this statute is intended to protect the victim from embarrassment and offensive publicity which no doubt have a strong tendency to affect her future standing in society. In addition to that it is a well known fact that many crimes of the character described go unpunished because the victim of the assault is unwilling to face the publicity which would follow prosecution. The feelings of a female under such circumstances can easily be imagined . . . ." 33 N.W.2d at p. 312.
>
> "It is considered that there is a minimum of social value in the publication of the identity of a female in connection with such an outrage. Certain it is that the legislature could so find. At most the publication of the identity of the female ministers to a morbid desire to connect the details of one of the most detestable crimes known to law with the identity of the victim. When the situation of the victim of the assault and the handicap prosecuting officers labor under in such cases is weighed against the benefit of publishing the identity of the victim in connection with the details of the crime, there can be no doubt that the slight restriction of the freedom of the press prescribed by [the state statute] is fully justified." 33 N.W.2d at p. 312.

We respectfully submit that the reasoning of the Supreme Court of Wisconsin is entirely sound. *Cf. Nappier v. Jefferson Standard Life Ins. Co.*, 322 F.2d 502 (4th Cir. 1963). Nor, of course, is this protection of the victim of the crime of rape the only instance where statutes have been enacted to prevent publication of the names of those involved in a crime. Ga. Laws 1971, pp. 709, 751 [Ga. Code Ann. § 24A-3503(g)], for example, provides that:

> "The name or picture of any child under the jurisdiction of the [juvenile] court for the first time shall not be made

> public by any news media, upon penalty of contempt . . . , except as authorized by an order of the court."

If Appellants' position is correct, statutes of this genre would also seem to be doomed even though this Court has seemingly approved of a state's policy decision to keep such matters confidential. See *In Re Gault*, 387 U.S. 1, 25 (1967).

Actually, courts have protected the individual privacy of citizens involved in crime even in the absence of statute. In *Briscoe v. Reader's Digest Association*, 4 Cal.3d 529, 483 P.2d 34 (1971), the Supreme Court of California was faced with a situation where a man who had been convicted of crime some eleven years earlier, but who had since led an honorable life and assumed a respectable place in society, awoke to find his life and dreams shattered by the entirely truthful retelling of his former criminal activities in the pages of Reader's Digest. With full recognition that the central purpose of the First Amendment is to give the citizenry the most complete possible understanding of the problems with which they must deal in a self-governing society, and with full recognition that this would in many cases cover the reporting of recent events even where it might involve the publication of an individual's name or likeness, the Supreme Court of California nonetheless held that the right to privacy claim before it was one which should be resolved by the jury. In the words of that court:

> "On the assumed set of facts before us we are convinced that a jury could reasonably find that plaintiff's identity as a former hijacker was not newsworthy." 483 P.2d at p. 43.

In discussing the balancing involved between the competing interests of speech or press and the individual citizen's privacy, the court said:

> "We have previously set forth criteria for determining whether an incident is newsworthy. We consider (1) the social value of the facts published, (2) the depth of the article's intrusion into ostensibly private affairs, and (3) the extent to which the party voluntarily acceded to a position of public notoriety." 483 P.2d at p. 43.

If the law, whether by statute or by judicial decision, is

permitted to protect the privacy of those who have engaged in criminal activities, surely the sensibilities of the victim can also be given some consideration. It is undoubtedly most illogical for a female who has been victimized by the crime of rape to feel a sense of shame or guilt over the matter. But illogical or not it is a fact of the real world is that they not infrequently do. Ga. Laws 1968, pp. 1249, 1335 (Ga. Code Ann. § 26-9901), which as the Wisconsin statute at issue in *Evjue* makes it unlawful to publish or broadcast the name of a rape victim, does no more than recognize this fact of life. Moreover, while affording some degree of privacy to the victim and her family, the statute also serves the salutary public purpose of facilitating the reporting and prosecution of the crime. We agree with the assessment of the Supreme Court of Wisconsin that any restriction which this might place upon the freedom of the press or free speech of the news media is of very little consequence when viewed in the light of the competing interests of the victim's right to privacy and the State's enforcement of its criminal statutes on one of the most loathsome crimes known to man.

CONCLUSION

For the reasons stated, we think that jurisdiction over this case is lacking under 28 U.S.C. § 1257. If, on the other hand, jurisdiction should for any reason be deemed to be present, we think that the decision of the Supreme Court of Georgia is clearly correct and should be affirmed. At pages 66 and 67 of their Brief, Appellants say that "Instantaneous dissemination of news in today's world of global and satellite communication through electronic means now requires more than ever an explicit enunciation of the protection afforded the press in America to publish the news . . . ." We would say that the instantaneous electronic dissemination to which Appellants refer much more urgently requires an increase in the protection which the law provides for the personal liberty of the private citizen (i.e. his right to privacy or to be let alone) against the intrusion upon his personal life by the communications media.

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IN THE

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OCTOBER TERM, 1973

No. 73-938

COX BROADCASTING CORPORATION
and
THOMAS WASSELL,

Appellants,

v.

MARTIN COHN,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF GEORGIA

BRIEF FOR MULTIMEDIA, INC., AS AMICUS CURIAE

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BRIEF FOR MULTIMEDIA, INC., AS AMICUS CURIAE

This brief is filed with the written consent of the parties pursuant to Rule 42 of the Court.

INTEREST OF AMICUS CURIAE

Multimedia, Inc., is a publicly held corporation having its principal place of business in Greenville,

South Carolina. In addition to owning daily newspapers and a radio and television station in Greenville, it owns radio and television stations in Macon, Georgia, the state in which this appeal arises. Multimedia, Inc., also owns a number of newspapers and radio and television stations in states adjacent to Georgia and South Carolina, to wit: the morning and afternoon newspapers in Montgomery, Alabama; radio and television stations in Knoxville, Tennessee, a daily newspaper and a number of weekly newspapers in middle Tennessee; both daily newspapers and a radio station in Asheville, North Carolina, and a television station in Winston-Salem, North Carolina. The newspapers of the corporation in states adjoining South Carolina and Georgia have circulation in these states, and broadcasts from certain of the electronic media owned by the company outside the states of Georgia or South Carolina are received in areas of one or the other of the two states. There is also substantial interstate circulation and broadcast penetration between the two states from the radio and television stations in Macon, Georgia, and the newspaper, radio and television stations in Greenville, South Carolina.

Three states in addition to Georgia have legislation of similar import to the statute challenged by Cox Broadcasting Corporation on this appeal. They are South Carolina, Florida and Wisconsin. The South Carolina statute was adopted in 1909 and provides as follows:

> "Whoever publishes or causes to be published the name of any woman, maid or woman child upon whom the crime of rape or an assault with intent to ravish has been committed or alleged to have been committed in this State in any newspaper, magazine or other publication shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars or imprisonment of not more than three years. But the provisions of this section shall not apply to publications made by order of court."

See Section 16-81, *Code of Laws of South Carolina*, 1962.

As a result of its several press and electronic publications within both the states of South Carolina and Georgia, Multimedia, Inc., has a direct and substantial interest in the way in which this case is decided.

ARGUMENT

Introduction

South Carolina adopted its statute prohibiting publications respecting the names of rape victims two years prior to the enactment of the Georgia statute. *Georgia Laws*, 1911, p. 179. The similarity of language in the statutes from the two adjoining states suggests a common genesis. The "likelihood of gallantry . . . perhaps combined with racial overtones" has been suggested as a motivation for the enactment of these statutes in an article noting that Florida also passed a similar statute in 1911. Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact*, 16 Stanford L.Rev. p. 107, 128. Without embracing these influences as the stimulus leading to the enactments, we can certainly say, from the closeness in time and geographical area of their passage, they appealed to the regional mores of the day. We must also say that whatever it was that commanded action in these three southern states did not have

similar sway in the rest of the nation. Only Wisconsin in 1925 passed any similar legislation.

There is no real legislative history for any of these enactments of which we are aware. It is said in *Nappier and Gurter v. Jefferson Standard Life Insurance Company and Jefferson Standard Broadcasting Company*, 322 F.2d 502 (4th Circuit, 1963) (the only decision construing the South Carolina statute) that the object of the law is to "encourage a free report of the crime by the victim". This, in fact, is merely the court's rationale for construing the South Carolina statute to prohibit not just the name but the identity of the rape victim. Nothing is really known of the legislative intent stirring these three deep south states to their near simultaneous action, nor do we know why the similar act occurred in Wisconsin nearly a generation later. If these statutes are to stand, however, they must be given a force sufficiently compelling to breach the ramparts set around free speech by the First Amendment. While it is no doubt true that the statutes might find vindication even in the absence of a legislative history, we submit that through the processes of reasoning (the only means in this case by which any "showing" can be made) it is impossible to give this narrow body of legislation the life force required for its survival in the face of the First Amendment.

I.

IN BROADLY PROHIBITING PUBLICATION OF THE NAME OR IDENTITY OF RAPE VICTIMS, STATUTES SUCH AS THOSE IN EFFECT IN GEORGIA AND SOUTH CAROLINA VIOLATE THE FIRST AMENDMENT AND RESULT IN CENSORED AND DISTORTED NEWS COVERAGE.

The statutes of Georgia and South Carolina can easily be discussed together. Both statutes are broadly drawn

so as, on their face at least, totally to prohibit publication at any time of the name of a woman subjected to rape. While the South Carolina statute has not been construed as to its total scope, it would presumably be accorded the same breadth as that given by the Supreme Court of Georgia to the statute of that state.

We do not in this brief repeat the persuasive arguments of the appellant in asserting unconstitutionality of the Georgia statute under the overbreadth doctrine. We believe it is worth pointing out in this brief, however, additional results of the broad proscription written into these laws.

Rape does not always occur as the single crime involved. The victim may be kidnapped and then subjected to rape. More frequently, as in the case in this appeal, sexual assault may be combined with the killing of the victim. All three crimes may often times be involved. Almost invariably, knowledge of the sexual assault comes after knowledge of the other crimes involved.

In the case of a kidnap, for example, the news media will typically join in the all-out effort to circulate as widely as possible the identity of the victim and their efforts in doing this are lauded with no exception. When the kidnapper is apprehended, this newsworthy fact is also given publicity and no one would question the imperative need to broadcast as a warning to others the apprehension of the criminal as well as his prosecution. But in the usual case it will be established only belatedly that the victim has been subjected to sexual assault and the prosecution which then ensues will involve not only the kidnapping but a charge of rape. Under the Georgia statute as construed by the Supreme Court of that State and under the equally

broad language of the South Carolina act, the news media are unable to give accurate coverage to the prosecution and trial. They must entirely hide from their readers the fact that any trial for rape is involved. This is so because the identity of the victim is already known as a result of the publicity given in connection with the kidnapping. Thus, if anything is to be written at all, it must be the half-truth that a trial is underway involving only the crime of kidnapping. Reports of the conviction and sentencing must likewise be distorted. The First Amendment was not meant to be subjected to this measure of violence in the name of misguided notions of gallantry.

In the *Nappier* case where the Court of the Fourth Circuit declared an action to exist for breach of privacy under the common law of South Carolina "as fortified by the statute", there was involved a television broadcast in which the names of the victims were not mentioned in the pictures or the narrative. The court, reading the statute to prohibit revealing the victim's identity, found that the two girls assaulted were well known as employees of the Dental Health Department working in the public schools with a puppet show in which the puppet was commonly known as Little Jack. They were identified, the court held, because the telecast showed pictures of their automobile revealing its license number and the words "Little Jack, Dental Division, South Carolina State Department of Health". The announcer described the vehicle as that used by the two young women who had been sexually assaulted.

The decision in *Nappier* viewed merely as a matter of construction seems right; but when studied in the background of the myriad occurrences reported in the news, it simply shows how wide an opening has been made in the Pandora's box.

If the identity of the victim becomes known in any manner, does the publication by which identity can be established *dehors* the publication itself subject the publisher to liability? This is not at all a far-fetched problem but one of repeated practical concern. In some situations, good taste would weigh against announcing the name of a person assaulted. But, particularly where the matter has become the subject of a public prosecution, the limits on news sought to be imposed by these statutes simply would not occur to reasonable men. Hence, transgressions of the statutes inevitably occur by unwary publishers–for example, by publications originating out of state where the author has no reason to know of the local statute, or, for that matter, by radio and television broadcasts within the state where the immediacy of the publication results in a limited opportunity for reflection or editorial review. In these situations, the identity of the rape victim may be widely circulated along with the name of her attacker. When this has occurred, the prudent publisher who is aware of the law may elect a course of total censorship in reporting the progress of a trial. He will do this because the situation will now permit nothing to be said without further identifying the rape victim.

It is not simply to satisfy a public taste for gossip or sensational reading that the First Amendment should permit accurate, uncensored publication in the field of sexual molestation. A community needs to know as much as can be known of the habits and mode of operation of sexually disturbed people. This is part of the general wisdom by which we seek to train our children into safe habits when approached by strangers. For most of the populace, this wisdom will come more from the daily contacts with life reported in a free press than it will from a study of textbooks in clinical

psychology. The court in *Briscoe v. Readers' Digest Association*, 93 Cal. Rptr. 866, 483 P.2d 34 (1971) gave cogent recognition to this in saying: "—these are vital bits of information for people coping with the exigencies of modern life".

Unquestionably a sexual assault is an emotionally devastating experience and one apt to be attended with great feelings of shame and humiliation. In some cultures it is apparently still a fact that a woman who has been raped is considered defiled.[1] It is a sensible society, however, that, while not discounting the indignity done, refuses to treat the victim of a sexual assault as a sullied outcast. Women have travelled a long road in pursuit of their quest for equal treatment and often times the most galling discriminations to which they are subjected appear in form as a chivalric act for their protection. The South Carolina statute is not directed toward both males and females who are subject to sexual assaults. It singles out the woman or "woman child" and makes no mention of the man or the "man child". A statute which perpetuates the implicit notion that a woman who has been subjected to sexual abuses stands in a different category from men rests on notions demeaning to women and inappropriate to their increasingly recognized claims for equal status.

[1] Accounts of the brief war in 1971 between India and Pakistan report that the married women of Bangladesh raped by the invading soldiers were rejected as outcasts even by their husbands. "The Rapes of Bangladesh", *The New York Times Magazine*, p. 10, July 23, 1972.

II

THE PROHIBITIONS AGAINST PUBLICATION CONTAINED IN STATUTES SUCH AS THE ONE INVOLVED ON THIS APPEAL NOT ONLY LIMIT FREE SPEECH BUT ALSO IMPAIR OTHER CONSTITUTIONAL RIGHTS.

It is unnecessary to repeat the point correctly made in the appellant's brief that a state's power to regulate speech is narrow and exists at all only upon a showing of grave and immediate danger to interests which the state may lawfully protect. The invasion must rest on a compelling basis, and there must be a rational classification of the interests sought to be protected. Thus, if the thrust of the attempted regulation is also to impair other constitutional rights, the absence of justification for limiting free speech becomes immediately apparent.

We have already suggested that at its root the statutory prohibition against publication of the identity of sexually molested women perpetuates a double standard inconsistent with the dignity and equal status toward which women would rightly move. If, however, we view these statutes as furnishing a proper protection against publicity, then it is a protection which should be conferred equally upon both sexes. It appears clear that in this light, the statutes are violative of the equal protection clause of the 14th Amendment. *Reed v. Reed*, 404 U.S. 71 (1971).

It was suggested in *Nappier* that the basis for shielding a victim's identity from publication is that the victim is more apt on this account to come forward with a report of the rape. If this is offered as the supporting rationale, of course the reason is gone if, as in the case on appeal, the victim is dead at the time of

publication. A statute so broadly framed as not to take account of this must in any event fall. But even if the victim is still alive, how can we say that the humiliation involved in sexual molestation will be any stronger deterrent to prosecution depending on whether the sex of the person involved is male or female. There is, we submit, no constitutional justification for protecting the sensibilities of one more than the other, or for assuming that one will be uninhibited in the prosecution of a crime while the other will not.

Equally important to a consideration of the argument that one is more apt to come forward if she can do so without having her identity disclosed is the effect upon the rights of the accused. Under the Sixth Amendment the accused has the right to a public trial and to be confronted with the witnesses against him. These rights are basic protections. Speaking of the right of confrontation, and the included right of cross-examination, the Supreme Court in *Green v. McElroy*, 360 U.S. 474 (1959), said:

> "They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him'. This Court has been zealous to protect the rights from erosion."

The right to be confronted with his accuser and the right to a public trial is not, we believe, fully secure when the accuser comes into court to level charges incognito. The plight of the defendant is considered in the article by Professor Franklin in 16 Wisconsin Law Review at page 137. He notes that, for example, the defense of the accused may be consent where identification of the complainant might be helpful in

securing testimony of others in the community as to her poor reputation for morality and veracity. He observes that the defense may also be helped by witnesses who saw the complainant shortly after the alleged attack and might testify to her apparent calm and unruffled manner and he concludes:

> "Although gathering witnesses is a job for the defense, every impediment to the accused in the preparation of his defense is contrary to our notions of a fair trial."

The notions of a fair trial implicit in the history-laden concepts of the right to a public trial and the right of confrontation are measurably impaired by the special anonymity given to women complaining to have been sexually molested. If, as we believe, the defendant in this circumstance is deprived of due process then surely the statute by which this is accomplished cannot claim the right of survival against the interests of free speech.

III

PUBLICATIONS SOUGHT TO BE PROHIBITED BY STATUTES SUCH AS THE ONE INVOLVED ON THIS APPEAL SHOULD BE DECLARED PRIVILEGED AS MATTERS OF PUBLIC INTEREST ENTITLED TO UNIFORM PROTECTION THROUGHOUT THE NATION.

In *Nappier*, the argument was made that the telecast concerning the sexual assault was a matter of public concern and accordingly was exempt from the rule of privacy. The Fourth Circuit responded as the Georgia Supreme Court has done in this case:

> "The ready replication is that the statute states an exception to the exemption. No matter the news value, South Carolina has unequivocally declared

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United Medical Laboratories, Inc. v. *Columbia Broadcasting System, Inc.*, 404 F.2d 706 (9th Cir. 1968) 20

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LeGrand, RAPE AND RAPE LAWS: SEXISM IN SOCIETY AND LAW, 61 Calif. L. Rev. 919 (1973) 38
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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-938

COX BROADCASTING CORPORATION AND
THOMAS WASSELL,
Appellants,

vs.

MARTIN COHN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

REPLY BRIEF FOR THE APPELLANTS

INTRODUCTION

This brief is submitted in response to the brief for the appellee and to the brief for the Attorney General of the State of Georgia, as *amicus curiae*, in support of appellee.

The appellants respectfully apologize for the length of this Reply Brief. However, the appellants respectfully submit that it may be of assistance to the Court to endeavor to respond to the contentions of the appellee, particularly in light of the two decisions rendered by this Court since the filing of the Brief of the Appellants.[1]

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1. Miami Herald Publishing Co. v. Tornillo, ___ U.S. ___, 94 S.Ct. 2831 (1974); Gertz v. Robert Welch, Inc., ___ U.S. ___, 94 S.Ct. 2997 (1974).

I.

PRELIMINARY REBUTTAL

A careful review of the arguments and authorities advanced in support of the appellee's position demonstrates that the appellee's contentions are not supported by and are directly contrary to the controlling decisions of this Court.

(A)

The Appellee Asserts That This Court Lacks Jurisdiction Of The Appeal.[2]

However, the decisions of this Court establish that the requirements of "finality" are satisfied where, as here, the highest state court has ruled upon the constitutional question[3] and the only remaining issues concern the application of state law. *Miami Herald Publishing Company* v. *Tornillo*, ... U.S. ....., 94 S.Ct. 2831 (1974); *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973). This policy has been particularly emphasized in cases where the constitutional ruling of the state court raised important questions regarding the freedom of the press under the First Amendment. *Miami Herald Publishing Company* v. *Tornillo, supra; Mills* v. *Alabama*, 384 U.S. 214, 221-222 (1966) (Douglas, J., concurring). See also *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 418 (1971).[4]

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2. Brief of Appellee, pp. 4-9.

3. Appendix to Jurisdictional Statement, A. 24-26.

4. A more extensive discussion of this point of rebuttal is contained in Section II of this Reply Brief at p. 8, *infra*.

(B)

The Appellee Argues That The Appellants Have Violated His First Amendment Right To Privacy.[5]

However, the appellee has overlooked the fundamental principle of constitutional law that to whatever extent the First Amendment secures a "right of privacy," to the appellee, that protection extends only against those exercising the *power of the government* to invade his privacy. Cf. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265 (1964). The decisions of this Court cited by the appellee, *e.g., Griswold* v. *Connecticut*, 381 U.S. 479 (1965), assure the privacy of the individual against *governmental* intrusion.

> ". . . The First Amendment has a penumbra where privacy is protected from *governmental* intrusion." *Griswold* v. *Connecticut*, 381 U.S. at 483 (emphasis supplied).

The appellants, a private newsman and the television station which employed him, exercised no such governmental power in broadcasting their truthful report of the public court proceedings of which the appellee now complains. Moreover, both parties and the *amici curiae* have agreed that this case is controlled by this Court's earlier holdings that the freedoms of speech and of the press guarantee the liberty to discuss publicly and truthfully all matters of public interest and concern. *Thornhill* v. *Alabama*, 310 U.S. 88, 101-102 (1940); *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964).[6]

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5. Brief of Appellee, p. 22; Brief of State of Georgia, p. 13.

6. A more extensive discussion of this point of rebuttal is contained in Section III of this Reply Brief at p. 15, *infra*.

(C)

In Support Of Georgia Code Ann. Section 24-9901, The State Of Georgia And The Appellee Argue That The Government May Properly Establish Guidelines As To What Will And What Will Not Be "Deemed" A Matter Of "Legitimate Public Interest."[7]

However, this Court recently rejected just such a claim by the State of Florida in *Miami Herald Publishing Company* v. *Tornillo*, ... U.S. ....., 94 S.Ct. 2831 (1974):

> ". . . *The Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors.* A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to the limitations on the size of the paper, and content, *and treatment of public issues and public officials*—whether fair or unfair—constitutes the exercise of editorial control and judgment. *It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.*" ..... U.S. at ....., 94 S.Ct. at 2839-40 (emphasis supplied.)

Freedom of the press requires that the editor be free to determine what subjects, issues and facts are of public interest within the context of his audience. As long as his publication is truthful, the editor's determination as to the public interest should be reviewable, if at all, only for clear abuse of his constitutional discretion. *Miami Herald Publishing Co.* v. *Tornillo, supra.*[8]

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7. Brief of Appellee, p. 21; Brief of State of Georgia, p. 20.

8. A more extensive discussion of this point of rebuttal is contained in Section IV of this Reply Brief, p. 23, *infra.*

(D)

The Appellee Asserts That The Appellants' Publication Of The Name Of The Victim In The Course Of Their Broadcast News Coverage Of The Public Trial Was An Embarrassing "Private" Fact Not Of Public Interest.[9]

However, it is clear from the record that at the time of the broadcast the name of the murder-rape victim was not a "private fact," but was instead a matter of public record. The victim's name was contained in the indictment (A. 23, 25) and was a part of the public court proceedings held during the arraignment and sentencing of the various defendants who pleaded guilty. (A. 17-18.)

The appellee asserts that the name of the victim is not a matter in which the public has a "legitimate" interest.[10] Although the appellants challenge the appellee's arbitrary concept of "legitimate" public interest,[11] it is apparent on the facts and record that the publication of the victim's name in the present case was of clear public interest:

> (1) The public has a legitimate interest in seeing that those accused of the rape and murder of Cindy Cohn are fully prosecuted. The public is entitled to know all the facts which surround the exercise of the prosecutor's discretion to drop the murder charges and recommend light sentences in this particular case. Hence, the victim's name identified the particular prosecution.

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9. Brief of Appellee, p. 10.

10. Brief of Appellee, pp. 18-20.

11. "The issue is not whether the public, or a segment thereof, is curious, or desires to know something, but rather, whether the public has any legitimate concern to justify the intrusion into a person's life." Brief of Appellee, p. 19.

(2) The public has a legitimate interest in knowing all of the circumstances surrounding the crime and the subsequent prosecution. This information is essential for the public to understand the dangers to which they and their children are exposed and to determine what social and political actions may be necessary for their protection. The victim's identity is one of the facts which convey information to a portion of the public concerning the relationship of the victim to those accused of the crime. The victim's character and her social, economic and educational background are all relevant facts uniquely associated with her name or identity.

(3) The use of the victim's name serves the public interest in advising potential witnesses who may be unknown or unaware of the prosecution to come forward for either the prosecution or the defense. The public has a legitimate interest in seeing that a criminal prosecution is conducted in a fair and vigorous manner.

The appellee carefully excludes from his definition of "legitimate public interest" the public's desire to know all of the facts surrounding the crime, including the name of the victim.[12] However, the *Restatement (Second) of Torts* (Tent. Draft No. 13, 1967) from which the appellee takes his definition of "legitimate" public interest specifically recognizes the importance of the public "curiosity" in defining the publisher's privilege:

". . . [T]hose who are the victims of crime, or are so unfortunate as to be present when it is committed, as well as those who are the victims of catastrophes

12. Brief of Appellee, pp. 18-19.

or accidents, or . . . other events which attract public attention . . . *are subject to the privilege which publishers have to satisfy the curiosity of the public as to its heroes, leaders, villains and victims,* and those who are closely associated with them." *Restatement (Second) of Torts*, §652F, Comment *d*, at 128 (emphasis added).

The appellee also admits the accuracy of the saying that "names are news," but dismisses this fundamental journalistic principle as a "commercial fact" unrelated to the narrow constitutional issue which he would draw.[13]

(E)

The Appellee Argues That Georgia Code Ann. Section 26-9901 Is A Constitutional Restraint On The Press Justified By The Social Interests In Prohibiting The Publication Of The Name Of The Rape Victim.

However, the appellee fails to demonstrate how the statute's clear overbreadth can be reconciled with the constitutional discretion of the editor, *Miami Herald Publishing Co.* v. *Tornillo*, ... U.S. ....., 94 S.Ct. 2831, 2840 (1974), or with the acknowledged rule that criminal court proceedings are public events which may be fully reported, *Craig* v. *Harney*, 331 U.S. 367, 374 (1947).

The appellee overlooks the fact that neither the "social values" urged in support of the statute are served by the application of the prohibition to the present case where the victim died at the time of the assault:

(1) The victim can no longer be protected from publicity;

13. Brief of Appellee, p. 25. A more extensive discussion of this point of rebuttal is contained in Sections V(A) and (B) of this Reply Brief, pp. 29-37, *infra*.

(2) Nor can the victim be encouraged to report the crime or assist in the prosecution as a witness.

Indeed, *prior* to the publication of the victim's name by these appellants, the prosecutor had dropped the murder charges against all defendants, agreed to pleas of guilty to the lesser charges of rape and attempted rape, and recommended light sentences.[14]

The argument that Ga. Code Ann. §26-9901 is similar to the statutory protections afforded juvenile court proceedings is equally unfounded.[15] The juvenile statutes restrict the access of the public and the press to the juvenile court records and proceedings.

However, there is no issue in this case concerning the right of the press to *obtain* the name of the rape victim or to attend criminal court proceedings concerning prosecutions for rape. The issue here concerns whether the press is free to truthfully publish all of the facts related to a prosecution which is open to the public, a matter of public record and subject to discussion within the community.[16]

II.

THIS COURT HAS JURISDICTION OF THE APPEAL

In the brief for the appellee and in the *amicus* brief filed by the State of Georgia, counsel have argued that the judgment of the Supreme Court of Georgia is not "final" as required by 28 U.S.C. §1257.[17] The State of Georgia also

14. A more extensive discussion of this point of rebuttal is contained in Section V(C) of this Reply Brief, p. 37, *infra*.

15. GA. CODE ANN. §§24A-1801 (c) and 24A-3501. See Brief of Appellee, p. 21n; Brief for the State of Georgia, pp. 21-22.

16. A more extensive discussion of this point of rebuttal is contained in Section VI of this Reply Brief, p. 39, *infra*.

17. Brief of Appellee, p. 5; Brief of the State of Georgia, p. 5.

suggests that 1968 Ga. Laws, pp. 1335, 1336 (Georgia Code Annotated §26-9901), which the Supreme Court of Georgia examined and expressly held constitutional in the present case, is only "tangentially involved" and, hence, will not support an appeal under 28 U.S.C. §1257(2).

The appellants would respectfully show this Court that both of these contentions are erroneous.

(A)

The Decision Of The Supreme Court Of Georgia Is "Final" For The Purpose Of Review Of The Federal Constitutional Issues Under 28 U.S.C. §1257.

The appellants respectfully submit that the Court's decisions in *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973), and *Miami Herald Publishing Co.* v. *Tornillo*, ... U.S. ....., 94 S.Ct. 2831 (1974), control the question of "finality" under 28 U.S.C. §1257 in the present case.

The appellants continue to rely upon the authorities set forth in their original Brief, pages 24 through 30, which demonstrate that the requirement of "finality" is to be given a "practical rather than a technical construction."[18] The cases cited also clearly indicate this Court's pragmatic approach to the question of finality.[19]

18. Gillespie v. U. S. Steel Corp., 379 U.S. 148, 152 (1964); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949).

19. Local 438 v. Curry, 371 U.S. 542 (1963); Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963); Mills v. Alabama, 384 U.S. 214 (1966); Rosenblatt v. American Cyanamid Company, 15 L.Ed.2d 39, 86 S.Ct. 1 (1965) (opinion of Mr. Justice Goldberg not reported in U.S. Reports); Brady v. Maryland, 373 U.S. 83 (1963); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949); North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973).

However, the appellants particularly wish to call the Court's attention to its recent decision in *Miami Herald Publishing Company* v. *Tornillo*, ... U.S. ....., 94 S.Ct. 2831 (1974), wherein this Court held that it had jurisdiction under 28 U.S.C. §1257 to review the decision of the Supreme Court of Florida upholding the constitutionality of a Florida statute requiring a newspaper to publish the reply of a political candidate who had been "assailed" in the paper. At the time this Court determined that it had jurisdiction, the Supreme Court of Florida had reversed a lower trial court ruling that the Florida statute unconstitutionally violated the First and Fourteenth Amendments and had remanded the case for trial. The newspaper appealed to the United States Supreme Court.

In *Tornillo*, as in the present case, this Court deferred the question of jurisdiction to the hearing of the case on the merits. 414 U.S. 1142 (1974). Following oral argument, this Court concluded that the judgment of the Supreme Court of Florida was "final" for the purposes of this Court's jurisdiction.

> "In North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973), we reviewed a judgment of the North Dakota Supreme Court, under which the case had been remanded so that further state proceedings could be conducted respecting Snyder's application for a permit to operate a drug store. We held that to be a final judgment for purposes of our jurisdiction. Under the principles of finality enunciated in *Snyder's Drug Stores*, the judgment of the Florida Supreme Court in this case is ripe for review by this Court." *Miami Herald Publishing Company* v. *Tornillo*, 94 S.Ct. at 2834.

The First Amendment values which influenced this Court's finding of finality in *Miami Herald Publishing Company* v. *Tornillo* are similarly present in this case.[20]

The uncertainty of the constitutional validity of Georgia Code Ann. §26-9901 restricts the present exercise of First Amendment rights. The constitutional uncertainty extends beyond the area of the prohibition of the statute, i.e., the name or identity of the female victim of a rape, and represents an invitation to the legislature to exercise the power sanctioned by the Supreme Court of Georgia to enact varying regulations as to the content of the press.[21]

The appellants respectfully submit that the Georgia statute prohibiting publication presents an urgency similar

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20. This Court in *Tornillo* noted:

"Both appellant and appellee claim that the uncertainty of the constitutional validity of [the Florida statute] restricts the present exercise of First Amendment rights. Brief for Appellant, at 41. Brief for Appellee, at 79. Appellant finds urgency for the present consideration of the constitutionality of the statute in the upcoming 1974 elections. Whichever way we were to decide on the merits, it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture of [the Florida statute] could only further harm the operation of a free press. *Mills* v. *Alabama*, 384 U.S. 214, 221-222 (1966) (Douglas, J., concurring). See also *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 418 n. (1971)." Miami Herald Publishing Company v. Tornillo, 94 S.Ct. at 2834 n.6.

21. The State of Georgia goes so far as to submit:

". . . that it is entirely proper for the government, which is responsible to the people, to establish guidelines (subject, of course, to constitutional limitations) as what will and what will not be deemed to be a matter of legitimate public concern and interest—at least where the individual citizen's right to privacy is concerned. Government may do so, we submit, both through appropriate legislation or through judicial decisions." Brief of the State of Georgia, p. 20.

Appellants are also aware that at least one other state, North Carolina, has considered and is presently considering the enactment of legislation similar to Georgia Code Ann. §26-9901.

to the Florida statute requiring publication. The uneasy and unsettled constitutional posture of Georgia Code Ann. §26-9901 can only further impair the desired free and uninhibited operation of the press. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Miami Herald* v. *Tornillo*, 94 S.Ct. at 2834.

The issue in *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973), arose when the North Dakota Supreme Court struck a state statute requiring ownership of a pharmacy by registered pharmacists. The Supreme Court of North Dakota held that the statute violated the federal Constitution and remanded the case to the State Pharmacy Board to conduct an administrative hearing on the application to operate a pharmacy, *sans* the constitutional issue. This Court held that although there were state law questions to be considered on remand, the federal constitutional question was ripe for decision. 414 U.S. at 162.

Similarly, in the present case, the Georgia Supreme Court has decided the constitutional questions and has remanded the case for trial on the remaining issues of fact under state law. The Georgia Supreme Court has concluded that because of Georgia Code Ann. §26-9901, the appellants' publication in this case is not entitled to constitutional protection[22] and that the statute does not violate the First or Fourteenth Amendments to the Constitution.[23] Thus, as in *North Dakota State Board of Pharmacy*, the State Supreme Court has here remanded the case to the inferior state tribunal for decision solely on the basis of the applicable state law. No further consideration will be given to the federal constitutional questions

22. See Appendix to Jurisdictional Statement, A. 26.

23. See Appendix to Jurisdictional Statement, A. 26.

which have been finally decided by the State Supreme Court.

The appellee argues that upon remand of this case, the appellants may be successful in avoiding a judgment for damages and suggests that this would thereby render the constitutional decision of the Supreme Court of Georgia "moot."[24]

To the contrary, the judgment of the Supreme Court of Georgia has forever validated the Georgia statute (Ga. Code Ann. §26-9901) unless and until that decision is reviewed by this Court. Even if the appellants should prevail on the issues of state law in the lower court, they will continue to suffer under the inhibitions[25] of a state criminal statute which has been construed to limit the broadcast of truthful news accounts of public court proceedings.

If the appellants should suffer a money judgment in this case, a review of the application of the state law to the facts in this case would not in any manner alter the federal constitutional questions, which have now been finally decided by the Georgia Supreme Court and which are now ripe for this Court's review.[26]

Accordingly, under the rationale set forth by the Court in *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, and *Miami Herald Publishing Company* v. *Tornillo*, the decision of the Supreme Court of Georgia is final under 28 U.S.C. §1257.

24. Brief of Appellee, p. 8.

25. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

26. The appellee concedes that if the appellants' contentions in this Court are found to be meritorious, the entire case may be disposed of on the constitutional arguments. Brief of Appellee, p. 20.

(B)

The Decision Of The Supreme Court Of Georgia Is Properly Reviewable By Means Of An Appeal Under 28 U.S.C. §1257(2) Because Georgia Code Ann. §26-9901 Is Directly Drawn Into Question.

The State of Georgia suggests that the Georgia criminal statute, 1968 Ga. Laws, pp. 1335, 1336 (Georgia Code Ann. §26-9901), is only "tangentially involved" in this case because it reflects the state's public policy concerning the disclosure of the name or identity of a rape victim.[27] However, a reading of the decision of the Supreme Court of Georgia, together with the language of the Court's opinion denying the appellants' motion for rehearing, clearly reflects that the Georgia Supreme Court felt the statute was *directly* involved in the case, although the statute did not itself give rise to a civil cause of action.[28]

The appellants argued below that Georgia Code Ann. §26-9901 did not apply where the victim of the rape was dead at the time of the publication of the victim's name. Alternatively, the appellants argued that if the statute did apply to the conduct of the appellants, then the statute violated the First and Fourteenth Amendments to the Constitution of the United States.[29]

The Georgia Supreme Court in its second opinion expressly rejected the appellants' contentions and held that the 1968 Georgia statute was constitutional and directly involved in the case:

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27. Brief of the State of Georgia, p. 9.

28. "This Georgia statute and its predecessor . . . are penal in nature, and while these statutes establish the public policy of this state on this subject, neither of them created a civil cause of action for damages in favor of the victim or anyone else." Appendix to Jurisdictional Statement, A. 12.

29. Record, pp. 72, 111, 278, 282-83.

> "We hold that this 1968 Georgia statute is not unconstitutional, and *because of this statute* the disclosure of the identity of the victim of such a crime is not a matter of public interest and general concern in this state"[30] (emphasis supplied).

III.

THE FIRST AND FOURTEENTH AMENDMENTS PROTECT THE TRUTHFUL PUBLICATION OF MATTERS OF PUBLIC INTEREST

Although this Court has recently altered the scope of the constitutional protections afforded to false and defamatory publications,[31] it is a settled rule of constitutional law that:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully *all matters of public concern* without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened concept of these liberties as adequate to supply the public need for *information and education with respect to the significant issues of the times.*" *Kois* v. *Wisconsin*, 408 U.S. 229, 230 (1972) (emphasis supplied).

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30. Appendix to Jurisdictional Statement, A. 26.

31. Gertz v. Robert Welch, Inc., ... U.S. ....., 94 S.Ct. 2997 (1974). In *Gertz*, the Court limited the rule in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), to those instances in which the false and defamatory publication concerns a public officer or a public figure. The appellant's analysis of the application of *Gertz* to the present case is set forth in this brief in footnote 44, p. 21, *infra*.

See also *Thornhill* v. *Alabama*, 310 U.S. 88, 101-102 (1940); *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964); *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967).

Though the parties used slightly different words to describe the concept, this fundamental constitutional rule is agreed to be the controlling principle in the present suit by both parties and the *amicus curiae*.[32] The argument thus focuses on the following issues:

(1) The breadth of the constitutional protection afforded the broadcast of truthful matters of public interest;[33]

(2) Who is to decide whether or not a broadcast is constitutionally protected and privileged;[34]

(3) What role, if any, does Georgia Code Ann. §26-9901 have in that constitutional determination;[35] and

(4) Whether the broadcast of the name of a murder-rape victim in connection with the timely news coverage of the trial of those accused of the crimes

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32. The Brief of the Appellee concedes:

"Appellee has no quarrel with the decisions of this Court assuring that the First Amendment is not nibbled away and concedes that were the public identification in the news media of the name of the victim of a rape a legitimate matter of public concern, then Appellee's cause of action would fall—statute or no statute." Brief of Appellee, p. 20.

The Brief of the State of Georgia similarly concedes:

"The right to privacy, on the other hand, is also limited. One of the most important limitations is that it cannot be applied so as to prohibit the publication or broadcasting of matters *which are of legitimate public or general interest.*" Brief of the State of Georgia, pp. 18-19.

33. See discussion p. 18, *infra*.

34. See discussion p. 23, *infra*.

35. See discussion p. 39, *infra*.

was a matter of public interest or so "rationally related"[36] to the discussion of a subject of public interest as to be constitutionally protected?[37]

(A)

Truthful Factual Statements Are Constitutionally Protected

The appellants respectfully submit that the analysis in this case must begin with the clear articulation of the constitutional protections afforded *truthful* speech as distinguished from the protections afforded *false and defamatory* speech. *Gertz* v. *Robert Welch, Inc.*, ... U.S. ....., 94 S.Ct. 2997 (1974); *Pickering* v. *Board of Education of Township High School*, 391 U.S. 563, 570 (1968); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). At least since this Court's decision in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942), upon which the appellee relies, the measure for the constitutional value of speech has been expressed in terms of whether the speech was "a step to truth."

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. *It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is*

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36. Kois v. Wisconsin, 408 U.S. 229, 231 (1972).

37. See discussion p. 29, *infra*.

clearly outweighed by the social interest in order and morality." 315 U.S. at 571-72 (emphasis supplied).

The protection of the truthful statement has followed throughout the series of cases in which this Court has considered the protections afforded false speech. *E.g., New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271 (1964); *Time, Inc.* v. *Hill*, 385 U.S. 374, 383-84 (1967); *Gertz* v. *Robert Welch, Inc.*, ... U.S. ....., 94 S.Ct. 2997 (1974).

> ". . . there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Gertz* v. *Robert Welch, Inc.*, ... U.S. at ....., 94 S.Ct. at 3007 (1974).

This Court has repeatedly held that the Constitution shields the truthful discussion from both civil and criminal sanctions:

> "*Truth* may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964) (emphasis supplied).

See also, *Kois* v. *Wisconsin*, 408 U.S. 229, 230 (1972); *Thornhill* v. *Alabama*, 310 U.S. 88, 101-102 (1940).

(B)

The Constitutional Protection Afforded Truthful Speech Extends To All Subjects And Issues Of Public Interest

The Constitution broadly protects the expression of all ideas and the discussion of all factual information necessary or appropriate to enable the members of society to

cope with the exigencies of their period. *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940); *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967). This Court has noted that there is no such thing as a false idea. *Gertz* v. *Robert Welch, Inc.*, ... U.S. ....., 94 S.Ct. 2997 (1974).

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz* v. *Robert Welch, Inc.*, ... U.S. at ....., 94 S.Ct. at 3007 (1974).

The decisions of this Court make it abundantly clear that the constitutional protection does not depend upon the "social utility" or "popularity" of the information.

> "It is now well established that the Constitution protects the right to receive information and ideas. . . . This right to receive information and ideas, regardless of their social worth, see *Winters* v. *New York*, 333 U.S. 507, 510 (1948), is fundamental to our free society." *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969).

Nor is the scope of the constitutional protection limited to purely political expression or comment upon public affairs:

> *"The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government.* One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. *The risk of the exposure is an essential*

incident of life in a society which places a primary value on freedom of speech and of press." Time, Inc. v. *Hill*, 385 U.S. 374, 388 (1967) (emphasis supplied).

The decisions of the courts throughout the nation reflect this national commitment to a broad and vigorous discussion of matters of public interest. Indeed, in *Time, Inc.* v. *Hill*, this Court cited twenty-two state decisions in which the courts had applied a "public interest" test in some form to preclude recovery for invasion of privacy. 385 U.S. at 383 n. 7. Some courts have spoken in terms of the "newsworthiness of the matter." *Sidis* v. *F-R Pub. Corp.*, 113 F.2d 806 (2nd Cir. 1940); *Cantrell* v. *Forest City Publishing Company*, 484 F.2d 150 (6th Cir. 1973), *cert. granted*, ... U.S. ..... (July 8, 1974). Some courts have held that the protection is extended on the basis of the interest of the public in a particular subject matter. *Bon Air Hotel, Inc.* v. *Time, Inc.*, 295 F.Supp. 704 (S.D. Ga. 1969), *aff'd*, 426 F.2d 858, 862 (5th Cir. 1970).

The courts have broadly protected discussions of such subjects as public health,[38] organized crime,[39] the public accommodations available at the Masters Golf Tournament,[40] the opening of a play on Broadway,[41] the misfortune which befalls the victims of the collapse of a bridge,[42]

38. United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., 404 F.2d 706 (9th Cir. 1968).

39. Wasserman v. Time, Inc., 424 F.2d 920 (D.C. Cir. 1970); Cerrito v. Time, Inc., 302 F.Supp. 1071 (N.D. Calif. 1969), *aff'd*, 449 F.2d 306 (9th Cir. 1971); Ragano v. Time, Inc., 302 F.Supp. 1005 (M.D. Fla. 1969), *aff'd*, 427 F.2d 219 (5th Cir. 1970); Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir. 1969), *cert. denied*, 395 U.S. 922 (1969).

40. Bon Air Hotel, Inc. v. Time, Inc., 295 F.Supp. 704 (S.D. Ga. 1969), *aff'd*, 426 F.2d 858 (5th Cir. 1970).

41. Time, Inc. v. Hill, 385 U.S. 374 (1967).

42. Cantrell v. Forest City Publishing Company, 484 F.2d 150 (6th Cir. 1973), *cert. granted*, ____ U.S. ____ (July 8, 1974).

the facts concerning the commission of various crimes and the subsequent prosecution of those accused.[43]

In an analogous case, *Edmiston* v. *Time, Inc.*, 257 F.Supp. 22 (S.D. N.Y. 1966), Judge Tyler dismissed plaintiff's claim for libel and invasion of privacy based upon the publication of a story to the effect that the plaintiff had voluntarily had sexual intercourse with a number of men. The Court found that the magazine article was a fair and true report of a state court opinion and that as such, it was a complete defense to the defendant's claim, both for libel and invasion of privacy. See also *Wagner* v. *Fawcett Publications*, 307 F.2d 409 (7th Cir. 1962), *cert. denied*, 372 U.S. 909 (1963).

Certainly, the scope of information needed and desired by the public with respect to the "exigencies of the period" extends far beyond the actions of public officials or persons who have thrust themselves to the forefront of public controversies.[44] Protection of truthful publications which con-

43. Bernstein v. National Broadcasting Company, 129 F.Supp. 817 (D.C. 1955), *aff'd*, 232 F.2d 369 (1956); Bremmer v. Journal-Tribune Company, 247 Iowa 817, 76 N.W.2d 762 (1956); Jenkins v. Dell Publishing Company, 251 F.2d 447 (3rd Cir. 1958); Jones v. Herald Post Company, 230 Ky. 227, 18 S.W.2d 972 (1929); Waters v. Fleetwood, 212 Ga. 161, 91 S.E.2d 344 (1956); Elmhurst v. Pearson, 153 F.2d 467 (D.C. Cir. 1946); Miller v. National Broadcasting Company, 157 F.Supp. 240 (D.C. Del. 1957); Hillman v. Star Publishing Company, 64 Wash. 691, 117 P. 594 (1911).

44. In Gertz v. Robert Welch, Inc., ____ U.S. ____, 94 S.Ct. 2997 (1974), this Court limited the "strategic protection" afforded *false* speech by the rule in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), to public officials and public figures. 94 S.Ct. 3010-3011. The Court's rationale in *Gertz* does not appear applicable to the present case because:

(1) truthful speech, as in this case, is entitled to greater constitutional protection than the false and defamatory speech in *Gertz;*

(2) the opportunity for "rebuttal," which this Court emphasized in *Gertz*, is immaterial here since "rebuttal" is not a remedy for truthful speech;

(Continued on following page)

cern only public officials or public figures would exclude information and discussion concerning a host of areas essential to the public, such as reports on the activities of organized crime,[45] private persons engaged in governmental or political corruption,[46] and publications concerning fraud on consumers.[47]

The courts have recognized that the broad Constitutional commitment to free speech and press and the concomitant requirement of a vigorous and uninhibited discussion of all matters of public interest include the broadest possible range of facts and topics. If, as this Court

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Footnote Continued—

(3) the "injury" to private reputation suffered in *Gertz* is objectively measurable within the community, while the "injury" to privacy is exclusively a product of the plaintiff's subjective personal feelings; and

(4) the substance of the defamatory statement in *Gertz* makes apparent the substantial danger to the reputation of the private individual. However, the publication of the truthful statement which was a matter of public record in the present case provides no similar warning that the statement will offend or invade the "privacy" of unknown private individuals.

There is no suggestion that the parents of the boys accused of the murder and rape in this case are any less "worthy" of protection than the parents of the victim. Yet the prosecution of this crime is no less a matter of public interest simply because none of the families "voluntarily" thrust themselves into the circumstances. *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967).

45. Cardillo v. Doubleday and Company, 366 F.Supp. 92 (S.D. N.Y. 1973); LaBruzzo v. Associated Press, 353 F.Supp. 979 (W.D. Mo. 1973); Cerrito v. Time, Inc., 302 F. Supp. 1071 (N.D. Calif. 1969), *aff'd*, 449 F.2d 306 (9th Cir. 1971); Alpine Construction Company v. DeMaris, 358 F.Supp. 422 (N.D. Ill. 1973); Porter v. Guam Publications, Inc., 475 F.2d 744 (9th Cir. 1973).

46. Alexander v. Lancaster, 330 F.Supp. 341 (W.D. La. 1971).

47. Lewis v. Reader's Digest Association, Inc., 366 F.Supp. 154 (D. Mont. 1973) (quack cures for arthritis); Hensley v. Life Magazine, Time, Inc., 336 F.Supp. 50 (N.D. Calif. 1971); Spern v. Time, Inc., 324 F.Supp. 1201 (W.D. Pa. 1971) (mail order "ministers").

has held, it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which *truth* will ultimately prevail,[48] then the measure of the constitutional protections can be no less broadly defined. No sanction should be allowed for the publication of a truthful discussion or any fact rationally related to the discussion of matters of public interest.

IV.

THE CONSTITUTIONALLY PROTECTED FUNCTION OF EDITORS IN THE CHOICE OF MATERIAL AND TREATMENT OF PUBLIC ISSUES REQUIRES THAT THE EXERCISE OF THAT DISCRETION NOT BE PENALIZED

(A)

Freedom Of The Press Requires That The Editor Be Free To Choose What Shall Be Truthfully Published.

The language of the First Amendment[49] and the decisions of this Court[50] demonstrate that the historical purpose of the framers was to keep the government and, in particular, the legislative branch of the government, out of the editor's chair. *Miami Herald Publishing Company* v. *Tornillo*, ... U.S. ....., 94 S.Ct. 2831 (1974).

> "For better or worse, editing is what editors are for; and editing is selection and choice of material." *Co-*

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48. Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367, 390 (1969).

49. "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. Amend. I.

50. Miami Herald Publishing Co. v. Tornillo, ... U.S. ....., 94 S.Ct. 2831 (1974); Garrison v. Louisiana, 379 U.S. 64 (1964); Time, Inc. v. Hill, 385 U.S. 374 (1967).

lumbia Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94, 124 (1973).

The constitutional protection afforded truthful speech must be broad enough to preserve the editor's discretion to choose from among those subjects and facts which have any rational relationship to the broad range of matters which have been historically acknowledged as matters of public interest.[51]

> ". . . the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the *function of editors*. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The *choice of material* to go into a newspaper, and the *decisions made as to limitations* on the size of the paper, and *content*, and *treatment of public issues* and public officials—whether fair or unfair—*constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.*" *Miami Herald Publishing Co.* v. *Tornillo*, ... U.S. at ....., 94 S.Ct. at 2839, 2840 (emphasis supplied).

A press which must depend upon a governmental determination as to what facts are of "public interest" in order to avoid liability for their truthful publication is not free at all. It is difficult to imagine a concept more pernicious to the institution of a free press than a rule that the discretion of the editor to publish truthful and factual ac-

51. *See, e.g.*, cases cited Fns. 38-43, *supra*.

counts shall be gauged by the judgment of the legislature as to what facts are of "public interest."[52]

The public of this country is not an undifferentiated mass. The fabric of our contemporary society is woven from the diverse groups which collectively compose the "public." Issues of burning concern to one group may be of no concern at all to a group in a different location, of a different age, of a different religion, a different sex, of different employment, of different political persuasion, or simply of a different interest.[53] Thus, the constitutional importance of a publication cannot be measured simply by the breadth of its appeal or popularity.

> "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. *The line between the informing and the entertaining is too elusive for the protection of that basic right.* Everyone is familiar with instances of propaganda through fiction. *What is one man's amusement, teaches another's doctrine.* Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." *Winters* v. *New York*, 333 U.S. 507, 510 (1948) (emphasis added).

A great diversity of facts and views is necessary for the operation of the "marketplace of ideas." *Gertz* v. *Robert Welch, Inc.*, ... U.S. at ....., 94 S.Ct. at 3007; *New York Times Company* v. *Sullivan*, 376 U.S. 254, 270 (1964).

52. It is upon this premise that the Georgia Supreme Court held that the appellants' publication was not entitled to the protection of the First and Fourteenth Amendments. Appendix to Jurisdictional Statement, A. 25, 26.

53. *See, e.g.*, Winters v. New York, 333 U.S. 507, 510 (1948).

The editor is not in a position to determine whether or not his publication will invade what any single viewer or reader deems to be his "privacy."[54] The editor is responsible for exercising the appropriate constitutional standard of care in ascertaining that the facts he publishes are accurate. *Gertz* v. *Robert Welch, Inc., supra.* However, the resources available to the editor to check the objective truth of his statements (*e.g.*, the reliability of the sources, the existence of corroborating public records or testimony, etc.) are not available to the publisher to determine whether someone will subjectively find the publication "highly offensive."

The institution of a free press requires the protection of the constitutional function of editors from the recognized potential of a jury exercising its discretion to punish the expression of unpopular views. *Winters* v. *New York*, 333 U.S. 507 (1948); *Time, Inc.* v. *Hill*, 385 U.S. 374, 406 (1967) (Harlan, J.)

> "In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views." *Gertz* v. *Robert Welch, Inc.*, ... U.S. at ....., 94 S.Ct. at 3012.

The protection afforded the editor must not be limited to immunity from damages only when he truthfully pub-

54. *E.g.*, under the broad civil action for invasion of privacy recognized by the Georgia Court in this case, it would be possible for a relative of a victim to claim an invasion of privacy from the broadcast of an interview to which the victim had consented.

lishes what a jury, the legislature or even a judge[55] agrees is a matter of "public interest." Such a rule would permit a substitution of the judgment of the jury, aided by hindsight and time for full deliberation, for the judgment which the editor must make under the limitations of the newsroom environment.

Accordingly, freedom of the press requires that the editor be free to determine what subjects, issues, and facts are of public interest in the context of his audience. As long as his publication is truthful, the editor's determination as to the public interest should be reviewable, if at all, only for clear abuse of his constitutional discretion. *Miami Herald Publishing Co.* v. *Tornillo*, ... U.S. at ....., 94 S.Ct. at 2839-40.

(B)

The Freedom Of The Press Requires Those Who Would Restrain Or Penalize Truthful Publications To Overcome The Presumption Of Unconstitutionality.

Any state-imposed burden upon the publication of truthful speech must first overcome the heavy constitutional presumption against its validity. *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958); *New York Times Co.* v. *United States*, 403 U.S. 713 (1971).

> "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity. . . . Respondent thus carries a heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971).

55. This Court in *Gertz* expressed reservations about the wisdom of entrusting to the judiciary the task of determining what is of "public interest" on an *ad hoc* basis. Gertz v. Robert Welch, Inc., ... U.S. at ....., 94 S.Ct. at 3010.

Thus, the appellee must bear the substantial burden of overcoming this presumption and proving that the appellants' broadcast is not entitled to the protection of the First and Fourteenth Amendments. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 280 (1964); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971).

At the minimum, the appellee must demonstrate that the evils to the order and morality of our society are so grave and imperative and that the facts published, though truthful, are of no conceivable value to any segment of the public as a "step to truth" as to amount to a clear abuse of the editor's constitutional discretion to publish and discuss subjects and facts which in his judgment are matters of public interest.[56]

This standard, as all other constitutional measures of the freedom of speech and press, must be applied in the first instance by the Court as a matter of law. *Miller* v. *California*, 413 U.S. 15, 25, 36 (1973); *Jenkins* v. *Georgia*, ... U.S. ....., 94 S.Ct. 2750 (1974); *Gertz* v. *Robert Welch, Inc.*, ... U.S. ....., 94 S.Ct. 2997 (1974); *Rosenblatt* v. *Baer*, 383 U.S. 75, 88 (1966). Only where the court concludes *as a matter of law* that the truthful publication complained of constitutes a clear abuse of the editor's constitutional discretion in the selection and treatment of material relating to matters of public interest can there be any jury issue as to the "offensiveness"[57] of the publication or whether the publication actually invaded the plaintiff's "zone of privacy."[58]

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56. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

57. The standards set forth by the Georgia Supreme Court in the instant case. Appendix to Jurisdictional Statement, A. 17.

58. *Id.*

Where, as here, the publication is truthful and concerns a public criminal prosecution, and the particular fact, i.e., the name of the victim of a murder-rape, is rationally related to the discussion of the prosecution and the circumstances of the crime and the punishment, the action against the news media and its reporter should be dismissed on motion as a matter of law.

V.

THE APPELLANTS' NEWS REPORT, INCLUDING THE PUBLICATION OF THE NAME OF THE VICTIM OF THE MURDER-RAPE, IS CONSTITUTIONALLY PROTECTED AS A MATTER OF PUBLIC INTEREST

(A)

The Publication Of The Name Of The Victim In This Case Was A Matter Of Public Interest Within The Constitutional Protection.

The appellee repeatedly complains that the appellants have failed to "articulate just how the utterance involved is of public or general concern"[59] and "frankly states that he has never heard from any source whatever a single logical reason suggested or proposed as to a positive value that would be served by publicly identifying the victim of a rape, whoever she might be."[60] The appellee has evi-

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59. Brief of Appellee, p. 20.

60. Brief of Appellee, p. 25.

dently overlooked the reasons and the supporting authority set forth by the appellants in their Brief.[61]

(1)

The Name Of The Victim Is Of Public Interest In Identifying The Particular Prosecution In Which Charges Have Been Dismissed And Pleas And Sentences Have Been Received.

As the appellee acknowledges, the rape and murder of Cynthia Cohn was a crime of substantial public interest within the community.[62] However, the prosecutions did not commence until some eight (8) months after the victim had died. Hence, those acquainted with Cynthia in the community, her classmates and friends, their parents, her teachers, her neighbors and others, already knew of her death and would have been interested in the termination of any prosecution as a result of her death.

61.

"The subject matter of [Ga. Code Ann. §26-9901], the name or identity of a rape victim is clearly related to the public's serious and legitimate interest in learning of the violations and enforcement of criminal law. In many instances, as here, the name of the victim can itself be a matter of public interest. Publication of the name or identity of a rape victim can serve the public interest in the tragedies which befall victims of crimes: in seeing that victims of crimes receive proper care and support; in facilitating the prosecution of criminal violations by identifying and securing possible prosecution and defense witnesses; and in assuring that the criminal processes in a particular case are proceeding without either subterfuge or harassment. Publication of the name of the victim of such a crime is certainly well within the broad definition of 'public interest' which has emerged in those cases dealing with the issue."

Brief of Appellants, pp. 17-18. See also Brief of Appellants, pp. 39-40.

62. Brief of Appellee, p. 2.

The public has a legitimate interest in knowing that those accused of the rape and murder of *Cindy Cohn* are being fully prosecuted and the public is entitled to know all the facts which surround the exercise of the prosecutor's discretion to drop the murder charge and recommend light sentences in this *particular* case.[63] Thus the use of the victim's name to identify the particular crime[64] under discussion to those who were familiar with the victim was of public interest.

(2)

The Publication Of The Name Of The Victim Was A Matter Of Interest In Connection With The Public's Understanding Of The Circumstances Of The Particular Crime.

The nature of the crime, the circumstances, the place and neighborhood where the crime was committed, the name, character and demeanor of both the attacker and the victim, together with any and all aggravating circum-

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63. Friendly and Goldfarb in their study, CRIME AND PUBLICITY, THE IMPACT OF NEWS ON THE ADMINISTRATION OF JUSTICE (1967) (cited by the appellee in his Brief, p. 17), remark:

"That public scrutiny *of all phases of police and prosecution activity is essential should be obvious.*

. . .

. . . the apparatus of criminal justice in America . . . is pervaded by politics in its least attractive form. With some exceptions at the higher levels, most state and local judges are elected. Characteristically, so are the prosecuting attorneys and county sheriffs. At no other place in the political structure of the state or city or county are the temptations for political expedience, chicanery, and corruption so great, simply because at no place are the opportunities so voluminous and the scrutiny so difficult." *Ibid.* pp. 44-45 (emphasis added).

64. A practice not unknown to the Georgia courts. See Frank v. State, 141 Ga. 243, 247, 80 S.E. 1016, 1018 (1913), a murder case which also involved a sexual assault on the victim.

stances surrounding the crime, are facts important to the public's understanding of the commission of the crime and the prosecution of those accused of the crime.

All facts which tend to bear on the circumstances of the crime, including the identity of the victim, are relevant and important to the public's understanding of the crime. Identification of the victim provides information concerning the character of the victim in provoking or resisting the attack, any association or relationship between the victim and the attacker and the socio-economic information relating to the parties and the commission of the crime. Such information is essential for the public to make informed judgments as to the dangers to which they and their children are exposed and what actions are necessary for their protection.

In their study, *Crime and Publicity*, Friendly and Goldfarb conclude:

> ". . . [S]ome of the citizen's interest in crime springs from sordid if not psychopathic roots. *But some grows from the perfectly proper need to know what is happening in his community.* . . . The citizen has as much stake as the mayor in the peace and quiet of his street and . . . perhaps more stake than the cop on the beat in his and his family's personal safety.
>
> *Crime of almost any sort is a threat to him. He has a need to know about it, its detection, its prevention, its punishment.* He is not willing, being sensible as well as democratic, to turn the whole area over to the officials who have been designated to cope with the subject, and never watch what they do and how they do it. Nor should he be willing to. *Merely to know that a crime has occurred, that a suspect has been arrested and, many weeks or months later, found innocent or*

> *guilty, is not always enough to satisfy him.* Nor should it be.
>
> The people of a community that purports to be self-governing—the average man and the leading men—need news of crime in appropriate detail (*which often means abundant detail*) to satisfy their interest as persons and as citizens. *The personal interest is not ignoble per se; the civic interest is essential.*" Friendly and Goldfarb, *op. cit.*, p. 42 (emphasis added).

(3)

The Name Of The Victim Is A Matter Of Public Interest In Securing Witnesses For Both The Prosecution And The Defense.

The public has a legitimate interest in seeing that the criminal prosecution is conducted in a fair and vigorous manner. The name of the victim can be of great importance in the identification and procurement of unknown witnesses who may have information or evidence relevant to the case concerning the crime or important to either the prosecution or the defense.

> "There can be no doubt that reports of current criminal activities are the legitimate province of a free press. The circumstances under which crimes occur, the techniques used by those outside the law, the tragedy that may befall the victims—these are vital bits of information for people coping with the exigencies of modern life. Reports of these events may also promote the values served by the constitutional guarantee of a public trial. Although a case is not to be 'tried in the papers,' reports regarding a crime or criminal proceedings may encourage unknown witnesses to come forward with useful testimony and

friends or relatives to come to the aid of the victim." *Briscoe* v. *Reader's Digest Association,* 4 Cal. 3d 529, ..., 483 P.2d 34, 39 (1971).

For example, by identifying the victim, a witness might recall that either the accused or the victim was seen in association with persons who might be able to furnish information concerning matters of provocation, enticement, consent, and the habits and the reputation of the victim. Likewise, disclosure of the name of the victim could be of assistance in securing eyewitness accounts of the activities of the attacker and the victim prior to the occurrence which might afford either corroborating testimony for the prosecution or exonerating testimony for the accused. Such information also forms the basis of the judgment of the court or jury as to any extenuating or mitigating circumstances with respect to the crime. Thus the use of the victim's name serves the public interest in advising potential witnesses who may be otherwise unknown or unaware of the prosecution to come forward for either the prosecution or the defense.

(B)

The Publication Of The Victim's Name Is Constitutionally Protected As A Truthful Fact Which Is Rationally Related To The Discussion Of A Matter Of Public Interest.

The name of the murder-rape victim when reported in connection with the other events of the crime and with the criminal proceedings surrounding the crime is a matter of public interest or rationally related to the discussion of a matter of public interest so as to be constitutionally protected.[65]

65. Kois v. Wisconsin, 408 U.S. 229 (1972). See also Brief of Appellants, pp. 60-65.

Significantly, the appellee does not argue that the news story concerning the criminal court proceeding was not a matter of public interest. Brief of Appellee, p. 20. The appellee does not contend that the publication of the name of the victim is not a fact rationally related to the news story which was broadcast.[66] Instead, the appellee argues that the publication of the name of the victim was a matter of "overpublication" by the news media. Brief of Appellee, p. 21.

> ". . . Is not the public's interest in factual news reporting *sufficiently* served by an account of the event itself without public identification of the person victimized." Brief of the Appellee, p. 20 (emphasis added).

Thus, the appellee's complaint is that the appellants published "too much"—not that the appellants published an extraneous private fact unrelated to the subject matter which was being discussed. Although the appellee characterizes this suit as dealing with the "public disclosure of embarrassing private facts,"[67] this argument appears strained in view of the conceded fact that the name of the victim was a matter of public record in the indictment and was part of the criminal prosecution.[68]

> ". . . *A trial is a public event.* What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. . . . *Those who see and hear what*

66. The appellee comments:

"The trite but accurate saying that 'names are news' is undeniable, but that is a commercial fact unrelated to the constitutional decision at stake." Brief of Appellee, p. 25.

67. Brief of Appellee, p. 10.

68. A. 23, 25.

> *transpired can report it with impunity.*" *Craig* v. *Harney*, 331 U.S. 367, 374 (1947) (emphasis supplied).

However broad the concept of "public interest" may be in the abstract, it is clear that it encompasses the discussion of court proceedings and timely accounts of criminal activities.[69] A number of courts which have considered the question of the identification of victims of sexual assaults have concluded that the "public interest" in discussing the actions of state courts or in discussing the crime itself require the dismissal of claims for "invasion of privacy." *Wagner* v. *Fawcett Publications*, 307 F.2d 409 (7th Cir. 1962), *cert. denied*, 372 U.S. 909 (1963); *Edmiston* v. *Time, Inc.*, 257 F.Supp. 22 (S.D. N.Y. 1966); *Carlson* v. *Dell Publishing Co.*, 65 Ill. App. 2d 209, 213 N.E.2d 39 (1965); *Hubbard* v. *Journal Publishing Co.*, 69 N.M. 473, 368 P.2d 147 (1962).

The appellants do not contend that the identity of *all* rape victims is necessarily a matter of public interest and to be published. But where, as here, the crime has resulted in a criminal prosecution and has become a matter of intense public interest, the editor must be free to exercise his judgment as to the "treatment" of the story and the choice of the "facts" related to the prosecution which he will include in his publication. *Miami Herald Publishing Company* v. *Tornillo*, ... U.S. ....., 94 S.Ct. 2831 (1974).

As the appellants stated in their initial Brief (pp. 23, 60-65), the editor's privilege to publish truthful accounts of matters of public interest must include the right to publish all facts "rationally related" to the subject. *Kois* v.

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69. Time, Inc. v. Hill, 385 U.S. 374 (1967); Kois v. Wisconsin, 408 U.S. 229 (1972); Time, Inc. v. Johnston, 448 F.2d 378 (4th Cir. 1971); Waters v. Fleetwood, 212 Ga. 161, 91 S.E.2d 344 (1956).

Wisconsin, 408 U.S. 229 (1972). To hold, as the Supreme Court of Georgia has done in this case, that the editor's discretion to publish truthful factual accounts is subject to an *ex post facto* review for "offensiveness" by a jury will result in a substantial degree of "self-censorship."

The appellants respectfully submit that their news story concerning the prosecutions in the Fulton County Superior Court of the six defendants for the murder and rape of Cynthia Cohn, including the identification of the victim, was a matter of clear public interest or so rationally related to the discussion of a matter of public interest as to be entitled to the protection of the First and Fourteenth Amendments.[70]

(C)

The Publication Of The Victim's Name In The Present Case Does Not Defeat Any Of The "Social Values" Urged By Appellee To "Outweigh" The Freedom Of The Press.

An examination of the "competing social values" which the appellee argues "outweigh" the freedom of the press *in this case* discloses that neither of the ends allegedly served by the prohibition are achieved on the facts of this case. The appellee argues that the prohibition:

> (1) protects the victim from publicity and thereby encourages her to report and prosecute the crime; and

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70. Mr. Justice Powell in granting a stay of a state trial court order restraining news coverage of a murder-rape prosecution recently noted:

> "*Decisions of this Court repeatedly have recognized that trials are public events. And 'reporters . . . are plainly free to report whatever occurs in open court through their respective media.*" Times-Pickayune Publishing Corp. v. Schulingkamp, ... S.Ct. ....., 43 U.S.L.W. 2046 (Mr. Justice Powell, July 29, 1974) (emphasis added).

(2) assists the prosecution by assuring a willing victim-witness.[71]

Since Cynthia Cohn died at the time the crime was committed, the appellee's argument that the prohibition will serve to reduce the victim's fear of publicity and thereby encourage her to prosecute is, at best, specious.[72] The appellee's claim that this prosecution was impaired by the publication of the victim's name ignores the fact that *prior* to the publication, the prosecution *dropped* the murder charges against *all* defendants and recommended light 5 year sentences for *all* defendants on their guilty pleas to the rape charges. The only case subsequently prosecuted arose where one of the defendants, unhappy with a jail sentence, sought to withdraw his guilty plea.[73]

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71. ". . . reporting a rape has such unpleasant ramifications for the victim—both because of her reputation and the necessary caution of the police in accepting those charges—that rapes too frequently go unreported. The response, it is submitted, must not only be legislative, judicial and attitude changes, but also to find a way, consistent with the *Constitution*, to reduce the reluctance of rape victims and/or their families to report the crime and testify in court." Brief of Appellee, p. 16.

"That the avoidance or reduction of publicity will aid law enforcement is axiomatic because the fear of publicity seriously interferes with effective law enforcement." Brief of Appellee, p. 17.

72. The appellee acknowledges that there is a paucity of studies on rape. Brief of Appellee, p. 14. The studies cited by the appellee do not differentiate between the rape victim's general fear of publicity arising out of court appearances, police interrogation, confessions to parents and close friends and general news coverage of criminal prosecutions. LeGrand, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919 (1973); Goldner, *Rape as a Heinous But Understudied Offense*, 63 J. CRIM. L.C. & P.S. 402 (1972).

73. Newsman Wassell reported:

"Judge McKenzie dropped the murder charge against all six . . . and proceeded with the charge of rape. The DA told the judge all six defendants wished to plead guilty . . . and not have a jury trial. The DA told the court the girl's family

(Continued on following page)

Thus, on the facts of this case the publication of the victim's name did not impair either of the two "social values" which the appellee belabors, but was instead clearly important to the public's understanding of the criminal court proceedings.

VI.

GEORGIA CODE ANN. §26-9901 UNCONSTITUTIONALLY ABRIDGES THE FREEDOM OF PRESS UNDER THE FIRST AND FOURTEENTH AMENDMENTS

The arguments presented by both the appellee and the State of Georgia fail to demonstrate how the Georgia statute, Ga. Code Ann. §26-9901, can be rescued from its apparent overbreadth. See Brief of Appellants, pp. 41-43. Neither the appellee nor the State of Georgia suggests how the Georgia statute, which broadly prohibits the publication of the victim's name in *all* circumstances, can be reconciled with the balancing of factors which they claim is required on a case-by-case basis.[74]

Footnote Continued—

felt that a lenient 5 year sentence would serve justice and he recommended a five year sentence.

. . .

"Joe Adam Thompson. His attorney Charles Weltner said Thompson would plead guilty to attempted rape. The Judge sentenced Thompson to 2 years with three months to serve. Weltner did not believe Thompson should have received a jail term because he did not actually commit rape and cooperated with the authorities. Thompson then changed his plea from guilty . . . and asked for a trial by Jury.

"Judge McKenzie said he knows the parents of the Thompson boy and would be glad to disqualify himself from the jury trial. Then upon a request by Weltner, Judge McKenzie said he would." A. 20, 21.

74. Brief of Appellee, p. 28; Brief for the State of Georgia, p. 13.

In support of the Georgia criminal statute, the State of Georgia submits:

> ". . . that it is *entirely proper* for the *government*, which is responsible to the people to *establish guidelines* (subject, of course, to constitutional limitations) *as what will and what will not be deemed to be a matter of legitimate public concern and interest*—at least where the individual citizen's right of privacy is concerned." Brief for the State of Georgia, p. 20 (emphasis supplied).

The State of Georgia cites no authority for this astounding proposition which clearly contravenes this Court's recent holding that the First Amendment protects the "function of editors" with respect to the choice of material to be published from governmental intrusion. *Miami Herald Publishing Company* v. *Tornillo*, ... U.S. ....., 94 S.Ct. 2831 (1974).

> "The choice of material to go into a newspaper, and the decisions made as to the limitations of the size of the paper, and content, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment. *It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with the First Amendment guarantees of a free press as they have evolved to this time.*" ..... U.S. at ....., 94 S.Ct. at 2840 (emphasis added).

The State of Georgia cites *Pickering* v. *Board of Education of Township High School*, 391 U.S. 563 (1968), in support of its argument that this Court has recognized that protected speech may be overbalanced by the state's interest.[75] However, in *Pickering*, this Court expressly rejected the State's contention that it could take disciplinary action against a teacher for truthful comments on matters of public concern:

> "Accordingly, to the extent that the Board's position here can be taken to suggest that even comments on matters of public concern that are substantially correct . . . may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it." 391 U.S., at 570.

The appellee also attempts to justify the Georgia criminal statute by comparing it with the statutes which provide for the confidentiality of juvenile court proceedings and records.[76] However, there is no issue in this case concerning the right of the press to *obtain the name of the rape victim* or to *attend criminal court proceedings* concerning prosecutions for rape. The issue in this case concerns whether or not the press is free to discuss truthfully and accurately all of the relevant and related facts concerning criminal court prosecutions which are in fact open to the public,[77] a matter of public record,[78] and the subject of public discussion within the community.[79]

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75. Brief for the State of Georgia, p. 17.

76. See Brief of Appellee, p. 21n.; Brief for the State of Georgia, pp. 21-22.

77. A. 19, 34.

78. A. 22-25.

79. This Court has distinguished the constitutional right of the press to *obtain access* to information from the right of the press to *publish* the information once obtained. Pell v. Procunier, ... U.S. ....., 41 L.Ed.2d 495 (June 24, 1974); Branzburg v. Hayes, 408 U.S. 665 (1972); New York Times Co. v. United States, 403 U.S. 713 (1971).

> "The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the

(Continued on following page)

The juvenile court statutes[80] do not prohibit publication of public records and matters of public interest. The statutes exclude the *public* and the *press* from access to the court's records and proceedings. Thus, the arguments advanced by the appellee with respect to the protection afforded the juvenile court records are wholly inapplicable to this case.

The Supreme Court of Georgia held Georgia Code Ann. §26-9901 to be constitutional.[81] That Court concluded that because of this statute, the publication of the name of the deceased victim in the present case was not a matter

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Footnote Continued—

public generally." Pell v. Procunier, ... U.S. at ....., 41 L.Ed.2d at 508.

However, the rule sought by the appellee in this case would bar the press from publishing facts to which the public does have access and which the public is free to discuss.

80. Georgia Code Ann. §24A-1801(c) provides:

"The general public shall be excluded from hearings involving delinquency, deprivation or unruliness. Only the parties, their counsel, witnesses, and other persons accompanying a party for his assistance, and any other persons as the court finds have a proper interest in the proceeding or in the work of the court may be admitted by the court. The court may temporarily exclude the child from the hearing except while allegations of his delinquency or unruly conduct are being heard."

Similarly, the files and records of the Court are held to be confidential from the public and the press:

"Section 24A-3501. Inspection of court files and records.

"Except in cases arising under §24A-3101, and subject to the requirements of §24A-2201(d), all files and records of the court in a proceeding under this Code [Title 24A] are open to inspection only upon order of the court. The judge may permit authorized representatives of recognized organizations compiling statistics for proper purposes to inspect and make abstracts from official records, under whatever conditions upon their use and distribution the judge may deem proper, and may punish by contempt any violation of those conditions."

81. Appendix to Jurisdictional Statement, A-26.

of public interest and general concern and, hence, was unprotected by the First and Fourteenth Amendments.[82] The statute broadly prohibits the publication of the victim's name in *all* circumstances and applies even though the name is both a matter of public record and public interest. The statute clearly invades the function of editors and impairs the freedom of the press to publish truthful and factual information of or related to a matter of public interest.

VII.

CONCLUSION

Appellants respectfully submit that this Court has jurisdiction to review the final judgment of the Supreme Court of Georgia in this case holding that because of Georgia Code Ann. §26-9901, the appellants' truthful publication of the name of the deceased victim of the rape-murder in connection with their news coverage of the criminal prosecution was unprotected by the First Amendment.

The appellants urge the Court to find that Georgia Code Ann. §26-9901 unconstitutionally restricts the appellants' freedom of speech and of the press. The rule which the appellee and the State of Georgia urge this Court to apply would force a publisher or editor to determine at the risk of civil damages whether a jury, in retrospect, might view the publication of a truthful fact of public interest or one related to a matter of public interest as "highly offensive."

Such a rule would make the press understandably reluctant to publish facts which, although demonstrably true, might offend any one person in the readership or audience. Such a rule would reduce the scope and depth of news

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82. Appendix to Jurisdictional Statement, A. 25-26.

coverage and would constrict the information now available and needed by the public to test the ideas and beliefs competing in the "marketplace." Such a burden on the historically recognized need for full and robust discussion of matters of public affairs and public interest clearly violates the guarantees of a free press as they have evolved to this time.[83]

The appellants respectfully submit that the First and Fourteenth Amendments to the Constitution of the United States require this Court to reject the appellee's suggestion that a claim of "privacy" can be used to stifle or impair the truthful discussion of public affairs, public proceedings, or matters of public interest. The judgment of the Supreme Court of Georgia to the contrary is erroneous and should be reversed with directions to dismiss the case against the appellants.

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83. Miami Herald Publishing Co. v. Tornillo, ____ U.S. at ____, 94 S.Ct. at 2840; Time, Inc. v. Hill, 385 U.S. at 388-89; New York Times Co. v. Sullivan, 376 U.S. at 270; Thornhill v. Alabama, 310 U.S. at 101-102.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973
NO. 73-938

COX BROADCASTING CORPORATION AND
THOMAS WASSELL,
Appellants,

v.

MARTIN COHN,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF GEORGIA

REPLY BRIEF FOR THE APPELLEES

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REPLY BRIEF FOR THE APPELLEES

INTRODUCTION

This brief is submitted in response to the reply brief of appellants. Appellee has made every effort to avoid repetition of the same arguments made in its original brief but feels that

a further explanation of its position is necessary, especially in light of appellants' assertion that two recent decisions of this Court may have altered the legal and constitutional posture of this case.[1] Insofar as appellants have reargued their position as to the jurisdictional issues in this case, appellee sees nothing new that had not already been stated. Appellee, therefore, is content with its original brief thereon, but would add, as a point of emphasis, that this Court's decision in accepting jurisdiction in *Organization for a Better Austin v. Keefe*, 402 U. S. 415 (1971) seemed to rely on the fact that there was no indication that a temporary injunction rested on a disputed question of fact "that might be resolved differently upon further hearing. Indeed, our reading of the record leads to the conclusion that the issuance of a permanent injunction upon termination of these proceedings will be little more than a formality." Decidedly, there is a great deal more to be decided upon the trial of this case than "a formality." For the same reasons, appellee believes this Court's acceptance of jurisdiction in *Tornillo*, supra, is similarly distinguishable.

I.

PRELIMINARY REBUTTAL

A.

APPELLANTS ARGUE THAT THE FIRST AMENDMENT PROHIBITS THE STATES FROM LEGISLATIVELY OR JUDICIALLY PROTECTING THE ANONYMITY OF PRIVATE CITIZENS FROM PUBLICATION IN THE PRESS.

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[1] *Gertz v. Welch*, ____ U. S. ____, 41 L.Ed.2d 789, 94 S.Ct. (1974); *Miami Herald Pub. Co. v. Tornillo*, ____ U. S. ____, 41 L.Ed.2d 730, 94 S.Ct. ____ (1974).

The thrust of appellants' argument seems to be that the States, through either the judicial or legislative branches of government, are constitutionally powerless to provide for the privacy of its citizens by determining that certain classes of its citizens or certain subject matter is not a matter of public interest and therefore constitutionally unprotected. Concomitant with this assertion is an elaborate exposition why the specific identity of a rape victim is a matter of public interest and therefore constitutionally protected. But if the States are powerless to declare that certain facts are not newsworthy or matters of public concern, why would it be necessary to even argue the newsworthiness of the identity of a rape victim? To ask the question is to suggest the answer, i.e., the constitutional protections for free speech and press have been limited to newsworthy persons and events. "Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency." *Sidis v. F-R Pub. Corp.*, 113 F.2d 806, 809 (2nd Cir. 1940); cert. den., 311 U. S. 711 (1940); *Time, Inc. v. Hill*, 385 U. S. 374, 383 (Fn. 7). This Court noted in *Time, Inc. v. Hill*, supra, that there was no question there presented whether truthful publications of such matter (i.e., intimate revelations) could be constitutionally proscribed.

It seems clear, thusly, that the precise issue raised in this case was absent in the *Hill* case, but it also seems equally apparent that a threshold decision must be made as to State power, judicial or legislative, to declare, in well-defined and narrow limits, that certain facts are not newsworthy. Recognition that this power does exist may be found in appellants' brief where they state that "appellee must demonstrate that the evils to the order and morality of our

society are so grave and imperative and that the facts published, though truthful, are of no conceivable value to any segment of the public as a 'step to truth' as to amount to a clear abuse of the editor's constitutional discretion to publish and discuss subjects and facts which in his judgment are matters of public interest."[2] While overstating the case somewhat, even that excerpt presupposes a limited power of the State to make a judgment that certain facts, though truthful, may not be published. Precisely this has been done here. Initially, the General Assembly of Georgia legislatively prohibited the publication of the name or identity of the victim or a rape or attempted rape. Secondly, the Supreme Court of Georgia made an independent judicial analysis, quite similar to that of the Wisconsin Supreme Court in *State v. Evjue*, 253 Wis. 146 (1948), and concluded as a matter of law that the identification by name of the victim of rape was not a matter of public interest that warranted constitutional protection. A fortiori, the statute was upheld.

B.

APPELLANTS ASSERT THAT THE NAME OF THE VICTIM OF A RAPE IS A MATTER OF PUBLIC INTEREST.

Appellants' assertion that appellee has overlooked their reasoning and authority in arguing that the publication at

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[2] Appellants' Reply Brief, p. 28, citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942).

A further exposition of this argument may be found at a later point in this brief.

issue is a matter of public interest entitled to constitutional protection is untrue.[3] Appellee has carefully evaluated appellants' reasoning and finds it without merit and lacking in common sense. All of the positive attributes appellants assert that arise from publication either are matters that could be the subject of robust debate and commentary without the use of the name at all or are outside the realm of legitimate public discussion. In summary, appellants' assertions and the rebuttal thereto are as follows:

> 1. Disclosures of the name of the victim could assist in securing eyewitnesses for or against the accused.
>
> Aside from the obviously contingent and remote nature of this reasoning, it presumes that the press is an arm of the prosecution or defense. If there were a need for witnesses the solution would lend itself to the parties and their attorneys or the agency responsible for investigation. Furthermore, there are numerous ways of identifying the facts of a crime without the use of the specific name. Besides, the need for witnesses was gone at the time of the instant publication as the cases were disposed of save one, and that was ready for trial.
>
> 2. Identification of the victim might aid a possible witness to recall information about the victim's associations, habits, reputation, matters of provocation and enticement.
>
> Primarily, this too addresses itself to the parties and their attorneys, but even more importantly, such

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[3] Reply Brief of Appellants, pp. 29-30.

information consists of the scandalous material heretofore used to blacken the reputations of rape victims that is inadmissible in the courts of Georgia now and may well be declared inadmissible in other States before long.[4] Again, this rationale is remote and contingent and does not do credit for the proponents of such publicity.

3. The people need to be informed of the victim's character, social, economic and educational background.

All the foregoing may be disclosed without publishing the identity of the victim.

II.

THE STATES MAY CONSTITUTIONALLY PROTECT THE PRIVACY OF ITS CITIZENS WHEN THE FACTS SOUGHT TO BE PROTECTED ARE OF LIMITED OR NO PUBLIC INTEREST.

The State of Georgia has sought to protect the right of privacy of a class of its citizens against what it deems to be unreasonable publicity for rational reasons related to social order and justice. As already pointed out in appellee's original brief, rape is a seriously under-reported crime. It is also a unique offense, the consequences of which can only imperfectly be appreciated by men. Appellants have said that

[4] California has enacted a new rape law banning virtually all disclosures of a rape victim's prior sex life in court. Purportedly this has already induced more women to report rapes. *Atlanta Constitution*, Oct. 28, 1974.

since the victim died at the time of the crime the policy of Ga. Code Ann. §26-9901 to encourage victims to report and prosecute crimes is "specious at best."[5] Whatever speciousness there might be is attributable to appellants' lack of recognition that encouragement to prosecute or the reverse involves the family of the victim, and the record shows how the prosecution was impaired by appellants' violation of the law.[6] Thus the underlying purpose of the statute as interpreted by the Supreme Court of Georgia is amply borne out.

It has therefore been demonstrated that from a factual standpoint and a logical, commonsense approach, the publication of the identity of the victim of a rape is of little or no value. As noted by this Court in *Time, Inc. v. Hill*, supra, in general, truthful reports of recent crimes and the names of suspects or offenders will be deemed protected by the First Amendment. But in construing that decision, the Supreme Court of California, in *Briscoe v. Reader's Digest Assoc.*, 93 Cal. Rptr. 866, 483 P. 7d 34 (1971) concluded that the First Amendment did not give the media the unmitigated right to publish the identity of suspected offenders or victims. In some jurisdictions, for example, the legislature has decided that the rehabilitative goals of the juvenile law are so important as to override the right of the press to identify juvenile defendants. In many other States the right of the press to report juvenile proceedings are limited. *In Re Gault*, 387 U.S. 1 (1967); *Briscoe v. Reader's Digest Association*, supra. Similarly, some states have prohibited the

[5] Appellants' Reply Brief, p. 38.

[6] See affidavits of John H. Nuckolls, Appendix at pp. 11-15, 30-32.

naming of rape victims in news reports. *Fla. Stat.* §794.03, F.S.A.; Ga. Code Ann. §26-9901; S.C. Code Ann. §16-81; Wis. Stats. Ann. §942.02. In both areas a contingent and remote case may be made for the newsworthiness of publishing specific identities, but compared with the social advantages of privacy, constitutional arguments nearly evaporate.[7]

III.

THE STATE OF GEORGIA HAS PROTECTED THE CONSTITUTIONAL RIGHTS OF A CLASS OF ITS CITIZENS THROUGH LEGISLATIVE AND JUDICIAL DECISION.

Instead of viewing this case as an abridgment of the First Amendment, one may equally view the statute and decision of the Georgia Supreme Court as in furtherance of the Bill of Rights. This Court, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), albeit speaking of governmental intrusions into privacy, enunciated the proposition that the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. *Griswold v. Connecticut*, at 484. Various guarantees create zones of

[7] For other examples of factual reports of current events not absolutely privileged, see: *Commonwealth v. Wiseman*, 356 Mass. 251 (film showing conditions in mental hospitals, including naked inmates, forced feedings, masturbation, sadism, with individuals identifiable); *Barber v. Time, Inc.*, 348 Mo. 1199 (1942) [name and picture of a woman with humiliating disease]; *York v. Story*, 9th Cir. (1963), 324 F.2d 450, cert. den. 376 U.S. 939 [indecent photos of plaintiff in poses induced by police officer].

privacy such as the right of association contained in the penumbra of the First Amendment; the Third Amendment's strictures regarding quartering of troops; the Fourth Amendment's prohibition against unreasonable searches and seizures; the Fifth Amendment's self-incrimination clause; and the provisions of the Ninth Amendment. What are we to say, then, when the State actively seeks to protect a class of its citizens, for rational reasons, directly related to social order and justice, and preserve a right implicitly thought to have constitutional dimensions. Is not this Court compelled to recognize that if the State has done so, it must perforce balance the interests that compete? Appellee submits that appellants have totally ignored the rational and constitutional justification for privacy in this case by a rote repetition of precedents reflected through a one-way looking glass.

IV.

GA. CODE ANN. §26-9901 DOES NOT UNCONSTITUTIONALLY ABRIDGE THE FREEDOM OF THE PRESS UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

In their reply brief Appellants argue at length that Ga. Code Ann. §26-9901 must fall because of certain decisions of this Court and for overbreadth. Appellee feels it essential to review those decisions of major importance to emphasize their distinguishing characteristics from this case. At the outset, appellants ignore the interpretation given this statute by the Supreme Court of Georgia[8] in which it was held that the

[8] Appendix to Jurisdictional Statement, A-26.

statute did not create a civil cause of action with consequent negligence per se. All the statute did was to say that the name or identity of a rape victim was not a matter of public concern and hence newsworthy. Damages will ensue only after a trial in which the plaintiff must prove that the public disclosure actually invaded his "zone of privacy" and also to prove that Appellants invaded this privacy with wilful or negligent disregard for the fact that reasonable men would find the invasion highly offensive.

In point of fact, the statute aids in avoiding the vice printed out in *Time v. Hill*, supra, where this Court deprecated the danger ensuing from an elusive negligence standard when the contents of the speech might afford no warning of prospectivy harm. In *Time v. Hill*, supra, of course, this Court was dealing with the press' knowledge of the falsity of a publication and the danger of liability for innocent or mere negligent misstatements. Here, a privacy case, such an issue does not exist. Further, the statute gave prospective notice in the clearest terms that publication was unauthorized, avoiding the pitfall involved in *Time v. Hill*.[9] Of the greatest importance is the fact that this Court made a judicial finding that the opening of a new play was a matter of public interest within the scope of protection afforded by constitutional guarantees of speech and press (Id. at p. 387). Consequently, this Court must make a similar initial decision in deciding the issue in this case.

The distinction between this case and *Gertz v. Welch, Inc.*, ____ U. S. ____, 41 L.Ed.2d 789, 94 S.Ct. ____ (1974)

[9]It should be noted that appellants had an internal policy against making the disclosure that forms the basis of this case. Appendix, p. 18.

is of the utmost importance. In capsulated form, this Court held that the First Amendment protection afforded the news media against suits by public persons is not to be extended to defamation suits by private individuals even though the defamatory statement concerns an issue of public or general interest. Secondly, as long as they do not impose liability without fault, the States may define for themselves appropriate standards of liability for a publisher or broadcaster of a defamatory falsehood injurious to a private individual. Thirdly, defamation plaintiffs unable to prove actual malice or reckless disregard for the truth are restricted to compensatory damages.

As to point one of *Gertz*, this case presents a situation in which a private person is suing the news media for making not a defamatory statement but a true statement regarding a matter *not* of public or general interest. As to the second point, here, liability has not been imposed without fault and the State has defined appropriate standards of proving or defining liability. The third point cannot have relevance to a privacy case as a reckless disregard for the truth could hardly be in issue, when by definition the publication, though unwarranted, is true. Appellants' analysis in their reply brief[10] is hardly persuasive. Their assumption that truthful speech is entitled to greater constitutional protection than defamatory or false speech does not necessarily follow when the true speech has serious negative social repercussions affecting a large class of persons while a defamatory statement, as in *Gertz*, affects but one man. The lack of opportunity for rebuttal in privacy cases is a compelling

[10]At p. 21, Footnote 44.

argument in favor of meaningful civil sanctions as no other redress, such as an apology or retraction, is possible. Further, contrary to appellants' assertion, there was ample warning that the statement would offend the "privacy" of private individuals. Why else the internal policy of appellants referred to above and what of the State statute, knowledge of the existence of which appellants have never denied? Finally, the factors that exist in favor of protecting the victims of rapes and their families from identification simply do not exist for the families of perpetrators. Significantly, appellants have evinced no awareness of the uniqueness in our culture[11] of the horror and shame arising from rape and lack any sensitivity therefor.

Appellants' analysis of *Miami Herald Publishing Co. v. Tornillo*, ____ U. S. ____, 94 S.Ct. 283 (1974) is also faulty. The statute in question there was a positive command requiring a newspaper to give space and incur an obligation of funds requiring, in effect, submission to a governmental dictation of what was to be printed. It also concerned a matter clearly of public interest, i.e., in the political context. That is a far cry from the issues in this case, but even as tortured as the construction of *Tornillo* by appellants is, they concede that the editor's determination as to the public interest may be reviewable for abuse of his constitutional discretion.[12] It is precisely that abuse that forms the basis of this case.

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[11] And many other cultures. Cf. the appalling situation in Bangladesh where married women raped by invading soldiers were spurned as outcasts by their husbands. "The Rapes of Bangladesh," *The New York Times Magazine*, p. 10, July 23, 1972.

[12] Reply Brief of Appellants, p. 4.

CONCLUSION

In *New York Times Co. v. U. S.*, 403 U. S. 713 (1971) Justice Douglas, in his concurring opinion, stated that "the dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be." At p. 723. "... Open debate and discussion of public issues are vital to our national health. On *public questions* there should be uninhibited, robust, and wide-open debate." *New York Times v. Sullivan*, 376 U. S. 254. A recurring theme is governmental suppression of information relating to possible or actual governmental misconduct, *Near v. Minnesota*, 283 U. S. 697 (1931), with the concomitant use of the injunction. *Organization for a Better Austin v. Keefe*, 402 U. S. 415 (1971). Here, there is no question of injunctive power and the suppression, if the use of that term is apt, is not an attempt by government to protect itself or the "powers-that-be' from embarrassment, official or otherwise. No far reaching issue of censorship is involved nor is robust debate on public issues prevented. Nothing in the legislation or the decision of the Supreme Court of Georgia assailed by appellants limits one whit their ability to report in minute detail the facts and circumstances of the crime. The only thing the press may not do is link the facts of the case with the specific identity of the victim of a rape, not only for her protection but that of

society, which until now has treated such unfortunates with ostracism causing measureless tragedy. This case is stark proof that reliance on voluntary restraint and good taste by the press cannot be expected. To compare the weighty issues presented in *New York Times Co. v. U. S.*, supra, or *Garrison v. Louisiana*, 379 U. S. 64 (1964) to this case is to be blind to the true stature of the issues involved here. A reflexive, absolute view of the First Amendment has not been adopted to date by a majority of this Court. To do so now, either by holding the statute unconstitutional or by limiting recovery to actual damages, will totally destroy any right of privacy from the Press that private persons may now have in this Nation. As the Court aptly noted in *Miami Herald Publishing Company v. Tornillo*, supra, there has been a revolution in the communications media which raises serious questions of diversity of information and opinion in light of local monopoly.[13] The press is, in some cases, arguably as powerful as government. In this case the cast of characters consists not so much as the State v. press, but a sole individual, the bereaved father of a raped daughter, against an enormously powerful and wealthy business conglomerate who tore the veil of privacy from him without the slightest justification. To cast Appellants in the role of champions of a free press and victims of censorship or oppression is mockery.

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[13] B. Bagdikian, *The Information Machines*, 127 (1971).